UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1995/26
21 June 1995

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Subcommission on Prevention
of Discrimination and
Protection of Minorities
Forty-seventh session
Item 15 of the provisional agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Protection of the heritage of indigenous people

Final report of the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with Subcommission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights

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Introduction

1. By its resolution 1993/44 of 26 August 1993, the Subcommission on Prevention of Discrimination and Protection of Minorities endorsed the study of the protection of the cultural and intellectual property of indigenous peoples prepared by the Special Rapporteur Mrs. Erica-Irene Daes (E/CN.4/Sub.2/1993/28), and requested that she expand her study with a view to elaborating draft principles and guidelines for the protection of indigenous peoples' heritage. A preliminary report containing draft principles and guidelines was transmitted to the Subcommission at its forty-sixth session (E/CN.4/Sub.2/1994/31).

2. In accordance with the recommendation of the Subcommission contained in its resolution 1994/48, a note verbale was sent on 28 October 1994 to indigenous peoples' organizations, communities and nations, as well as to Governments, the specialized agencies and intergovernmental and non-governmental organizations, inviting them to submit comments on the draft principles and guidelines.

3. Replies have been received from the following: the Governments of Niger and Sweden; United Nations Centre for Human Settlements (Habitat); United Nations Environment Programme; Food and Agriculture Organization of the United Nations; International Labour Organization; World Intellectual Property Organization; American Indian Law Alliance; Black Hills Teton Sioux Nation; Indian Council of South America (CISA); Mapuche Nation (Consejo de Todas las Tierras); National Aboriginal and Islander Legal Services Secretariat. The Special Rapporteur wishes to express her gratitude to all those who have thus contributed to the completion of her study.

4. The Special Rapporteur was particularly fortunate to be able to participate in the Global Cultural Diversity Conference, organized by the Government of Australia as a part of Australia's observance of the fiftieth anniversary of the United Nations in April 1995. Also, she had the opportunity to exchange views with a number of indigenous people from different parts of the world community and in particular with the professors and experts of the Native Law Center, University of Saskatchewan. These discussions, among others, impressed upon the Special Rapporteur the high priority attached to this vitally important issue by indigenous peoples, and the breadth of support for urgent, prompt and effective action by the United Nations.

5. The present document reviews and responds to the comments which have been received by the above-mentioned Governments, specialized agencies and indigenous non-governmental organizations and presents a revised draft of the principles and guidelines for consideration and action by the Subcommission.

I. GENERAL COMMENTS

6. The Government of Niger observed that the absence of a definition of "indigenous people" invited subjective interpretations, which poses dangers for those emerging nations-States in Africa that face recurrent tribal

conflicts. Concern was also expressed about the proliferation of United Nations bodies and institutions, which may divert resources from existing activities.

7. The Government of Sweden explained that the Sameting, an elected governmental authority of Sami people established in 1992, decides how to allocate national funding for the promotion of Sami culture and the Sami language. Sami cultural heritage is included in the curricula of all Swedish schools, and Sami communities are free to establish their own schools. All abandoned sacred and ceremonial sites are protected by Swedish law; however, Swedish law does not distinguish between the intellectual property rights of Sami and other citizens. As a general matter, the Government of Sweden expressed concern that the guidelines not restrict freedom of speech or of the press, or freedom of academic inquiry.

8. The United Nations Centre for Human Settlements (Habitat), noting the attention already given by the Special Rapporteur to the spiritual and cultural attachment of indigenous people to their land, suggested that greater emphasis be placed on the need for legal recognition by Governments of traditional land tenure systems and land use practices, as this is a prerequisite for economic survival and the maintenance of the forms of social and cultural organization, norms, and practices of indigenous people.

9. The United Nations Environment Programme, noting its role as task manager for chapter 15 of Agenda 21, and its responsibilities for the implementation of the Convention on Biological Diversity, affirmed its commitment to continuing to facilitate and catalyze the cooperation of States in recognizing the unique contributions of indigenous peoples to conservation and sustainable development, as well as their right to be compensated for their contributions to society. Chapter 15 directs Governments to recognize and foster the traditional conservation methods and knowledge of indigenous people, and ensure the opportunity of indigenous people to participate in the benefits derived from such knowledge. Similarly, the Convention on Biological Diversity requests each Contracting Party, as far as possible and as appropriate, subject to its national legislation, to respect, preserve and maintain such traditional knowledge, and promote its wider application with the approval and involvement of indigenous people, and the equitable sharing of the benefits with the people concerned.

10. The Food and Agriculture Organization of the United Nations also noted that the question of indigenous peoples' heritage rests outside the ambit of its activities.

11. The International Labour Organization expressed the view that the draft principles and guidelines are a very positive development, which is moreover consistent with several provisions of the ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169). There are considerable similarities between paragraph 16 of the draft guidelines and article 27 of the Convention; paragraph 18 of the draft guidelines and article 28 of the Convention; and between paragraph 49 of the draft guidelines and article 27 of the Convention. It was noted that in some respects, the terms of the Convention are somewhat broader in scope.

12. The World Intellectual Property Organization maintained that its activities do not include the protection of the heritage of indigenous peoples, and therefore it would appreciate that all references to WIPO in the draft guidelines be deleted.

13. The American Indian Law Alliance reiterated its concern over the Human Genome Diversity Project, stressed the central importance of the international protection of indigenous peoples' lands, and noted that the present guidelines, if eventually adopted by the General Assembly, could provide a basis for requests by United Nations treaty bodies for information from State parties to existing human rights conventions.

14. The Black Hills Teton Sioux Nation also emphasized the importance of the protection of the lands of indigenous peoples, referring to its own situation in the United States, and in this context appealed for a greater respect for treaties made with indigenous peoples.

15. The Indian Council of South America (CISA) provided the Special Rapporteur with extensive suggestions for improving the wording of the principles and guidelines, by way of clarification. Several of these suggestions have been incorporated into the revised text.

16. The Mapuche Nations organization Aukin Wallmapu Ngulam (Consejo de Todas las Tierras) convened a conference in November-December 1994, at Temuco, Chile, to evaluate the consequences of the North American Free Trade Agreement for indigenous peoples in the Americas. Participants came from Chile, Argentina, Peru and Mexico, and adopted a declaration which, inter alia, condemned the accelerated usurpation and patenting of indigenous peoples' knowledge by transnational corporations.

17. The National Aboriginal and Islander Legal Services Secretariat provided the Special Rapporteur with the text of a proposed convention to establish international jurisdiction for the restitution of objects constituting a part of the heritage of indigenous peoples. While this proposal extends beyond the current mandate of the Special Rapporteur, it would be an appropriate task to consider undertaking as a follow-up to the adoption of the present guidelines and a recommendation to this effect has been added, as paragraph 60.

II. COMMENTS ON SPECIFIC RECOMMENDATIONS

18. Concerning the question of definition, the Special Rapporteur is in complete sympathy with the concerns expressed by the Government of Niger. She wishes to point out, however, that the United Nations has never found it appropriate or necessary to attempt a definition of the term "peoples", which appears in the Charter of the United Nations and in the International Covenants on Human Rights, or the term "minorities", which appears in the recently adopted Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Working Group on Indigenous Populations considered a working definition of the term "indigenous" at its second session (E/CN.4/Sub.2/AC.4/1983/CRP.2; E/CN.4/Sub.2/1983/22, paras. 109-119), but subsequently concluded that justice would best be served by allowing the scope of this concept to evolve

flexibly over time, through practice. Also, the Special Rapporteur of the Subcommission, José R. Martínez Cobo, in his Study of the Problem of Discrimination Against Indigenous Populations, has proposed a working definition, which in certain cases was unofficially used (E/CN.4/Sub.2/1986/7/Add.4, p. 29, para. 379, subsequently published as a United Nations publication, Sales No. E.86.XIV.3).

19. In connection with the recovery and restitution of heritage, the Government of Sweden observed that its current treaty obligations and national laws pertain only to the return of moveable cultural property between certain European Governments. The Special Rapporteur is aware of the limitations of existing bilateral and multilateral treaties for the return of moveable cultural property, having identified this as an important obstacle to the effective protection of indigenous peoples' heritage in her study. She also observes that the instrument she has drafted for consideration by the Subcommission is in the nature of a declaration, rather than a binding convention; that a declaration, in United Nations practice, is aspirational, and ordinarily goes further than the existing practices of States, with the aim of encouraging all States to adopt more effective legislation; and that this declaration of principles and guidelines, should it eventually be approved by the General Assembly, would constitute an invitation to States to consider taking additional steps to secure the purposes to which their existing cultural and educational legislation is already addressed.

20. With regard to strengthening national programmes and legislation, the Government of Sweden explained that Swedish law permits a person to retain items of moveable cultural property which were acquired in good faith. It is one of the principal aims of the measures proposed by the Special Rapporteur to heighten worldwide public understanding of the nature and importance of the heritage of indigenous peoples, so that public and private purchasers of objects with indigenous origins will be more cautious in the future, and demand adequate documentation of the licit acquisition of such objects. This is in the interest of legitimate collectors and scholars, as well as indigenous peoples. As for those objects which were removed from indigenous communities in the past, draft paragraph 22 does not require that they be returned in every case, but according to their cultural, religious, and historical significance. Paragraph 22 also contemplates the retention of objects in private as well as public collections, under agreements for custody made with the traditional owners. This strikes a balance between the interests of indigenous peoples in retaining particularly significant elements of their heritage, and the interests of good-faith purchasers in what they believe they have lawfully acquired.

21. The Government of Sweden also observed that Swedish law protects the creative freedom of artists, writers, and performers. This would not prevent artists from freely lending their support to strengthening public understanding of and respect for indigenous peoples' heritage, as contemplated by paragraphs 47 and 48 of the guidelines. Nor would the freedom of artistic expression be unduly curtailed by encouraging artists to seek the consent of indigenous peoples before incorporating elements of indigenous peoples' heritage into new creative works. The protection of artistic freedom is ancillary to the right of freedom of speech, which itself is never absolute, but subject to legitimate limitations in favour of the privacy, security,

rights and reputations of others. In the UNESCO Declaration of the Principles of International Cultural Cooperation (1966), moreover, the free exchange of cultural knowledge is expressly linked with "respect" and "reciprocity" among cultures. The study prepared by the Special Rapporteur documents the extent to which respect and reciprocity have been lacking in the case of appropriation of indigenous peoples' heritage by other societies. Paragraph 46 does not forbid the incorporation of indigenous peoples' heritage in works of art, but urges artists to consult with the peoples concerned and to seek their consent, which in turn will promote the growth of dialogue, understanding, respect and reciprocity, and indeed increase the extent to which artists appreciate the true meaning and full richness of the indigenous motifs and themes they have so long admired and copied.

22. Similarly, in the field of public information and education, the Government of Sweden expressed concern that journalists remain free to conduct critical investigations of all social issues, including those involving indigenous peoples. Specific provisions for the privacy of indigenous peoples are unnecessary, as the right to privacy is already secured to all citizens by Swedish law. The Special Rapporteur agrees wholeheartedly with the importance of protecting freedom of the press, and does not perceive how this freedom is jeopardized by paragraphs 50 and 51 of the draft guidelines. Respect for privacy and accuracy are well-established canons of international professional journalism, and expressing the importance of applying these canons scrupulously in the case of indigenous peoples does not create new restrictions. Indeed, paragraph 51 encourages the international mass media to increase their scrutiny of events involving the heritage of indigenous peoples.

III. ANALYSIS AND REVISIONS

23. The Temuco-Wallmapuche Declaration of 2 December 1994 underscores the urgency of taking international action to protect the heritage of indigenous peoples from further erosion by commercial interests. The rapid expansion of regional trading blocs in the Americas and South-East Asia and the intellectual property provisions of the Uruguay Round of GATT will facilitate and accelerate the acquisition of patents to indigenous peoples' knowledge by biotechnology firms in the North.

24. With respect to freedom of speech, freedom of the press, freedom of academic inquiry and artistic freedom, it should be emphasized that the right to privacy is guaranteed by article 17 of the International Covenant on Civil and Political Rights and that, pursuant to article 19 of the Covenant, there is no right to exercise the right of freedom of expression in ways that are injurious to the "rights or reputations of others". These principles imply, inter alia, a duty to maintain accuracy and transparency in the fields of information, communications and education, as the General Assembly recognized when it adopted the Guidelines for the regulation of computerized personal data files by resolution 45/95 of 14 December 1990. Accuracy with respect to information about indigenous peoples cannot be achieved without the participation of the peoples concerned.

25. The Special Rapporteur also fails to understand how the right to freedom of expression includes the right to obtain commercial or other benefits from the repetition of the ideas or creative works of others. The measures she has recommended pose no more of a conflict with free expression than patent and copyright legislation, which secure to the creators of useful knowledge and artistic works the right to control, and to benefit from, what they have created. A balance must always be struck between privacy, property rights, and the free flow of cultural and scientific knowledge, and the Special Rapporteur believes that the guidelines she has prepared strike this balance in a constructive, reasonable, fair and appropriate manner in the case of indigenous peoples, in the light of the intrinsically collective nature of these peoples.

26. With due respect for the concerns expressed by the Government of Sweden, furthermore, paragraph 49 of the guidelines does not require that journalists collaborate with indigenous peoples, or obtain their consent, whenever writing about them. Rather, it calls upon organs of the mass media to collaborate with indigenous peoples in preparing "special broadcasts and public service programmes", to promote a wider public understanding of these peoples and their heritage. The Special Rapporteur believes that this is consistent with, inter alia, article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination; articles 17 and 28 of the Convention on the Rights of the Child; article 5 of the Convention against Discrimination in Education; and article 31 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

27. With respect to the recommendation by Habitat that the guidelines broadly affirm the responsibility of Governments to recognize the land tenure systems of indigenous peoples, the Special Rapporteur believes that it is more appropriate to develop such a principle in the context of the draft declaration on the rights of indigenous peoples, which is currently before the Commission on Human Rights for its consideration, and possible revision. Furthermore, this issue has been addressed in comprehensive terms by article 17.1 of ILO Convention No. 169 and by paragraph 6.27 of the Programme of Action of the International Conference on Population and Development (see A/CONF.171/13). The Special Rapporteur agrees, however, that paragraph 31 of the present draft guidelines should be given as broad an application as may be consistent with the concept of "heritage" in her mandate, viz. Subcommission resolution 1993/44.

28. The Special Rapporteur also believed it appropriate to harmonize the terms of paragraph 18 with the parallel provision contained in ILO Convention No. 169.

29. Concerning the proposed role of the World Intellectual Property Organization in the implementation of the guidelines (paras. 53, 55 and 56), that agency has expressed its unwillingness to assume the additional responsibilities. It is far from the wishes of the Special Rapporteur to impose upon any part of the United Nations system tasks which it considers inappropriate or burdensome, although it would seem to be squarely within

the agency's existing mandate. In any event, it is clear that other United Nations bodies and specialized agencies are already committed to the protection and development of the rights and heritage of indigenous peoples, and it is to them that the final draft of the guidelines is now addressed.

30. The reader will observe that paragraphs 52 to 59, concerning the role of international organizations, have been re-ordered and revised, mainly to clarify the role of the Secretary-General in determining the proper assignment of implementation tasks among organs and agencies of the United Nations system.

IV. RECOMMENDATIONS

31. The Special Rapporteur respectfully recommends that the attached, revised Principles and Guidelines be considered by the Subcommission as a matter of the highest priority, with the aim of transmitting them to the Commission on Human Rights at its fifty-second session.

32. The Special Rapporteur expresses her sincere wish that it will be possible for the General Assembly to adopt a declaration of principles and guidelines on the heritage of indigenous peoples in 1996, which is the second year of the International Decade of the World's Indigenous People. The adoption of such an instrument would constitute a strong message of the commitment of the United Nations to the goals and objectives of the Decade, even while the Commission on Human Rights continues its review of the draft declaration on the rights of indigenous peoples, a far more comprehensive and far-reaching project.

33. In this connection, the Special Rapporteur further recommends the convening of a United Nations technical meeting, as early as possible in the Decade, to propose mainly practical modalities for the cooperation of relevant United Nations bodies and specialized agencies in protecting the heritage of indigenous peoples. The participants should include representatives of Governments, relevant United Nations bodies such as UNEP, the specialized agencies, in particular ILO and UNESCO, as well as the largest feasible number of representative organizations of indigenous peoples actively involved in the protection of heritage.

34. The Special Rapporteur notes that mandates already exist for the establishment of interregional technical exchanges and communications networks among indigenous peoples, for example in chapter 26 of Agenda 21, as well as General Assembly resolution 49/214 of 23 December 1994. Initiatives of this kind by appropriate United Nations bodies and specialized agencies in the field of heritage need not await the adoption of the Principles and Guidelines proposed here. On the contrary, such initiatives are urgently required to further the global recognition of "the value and diversity of the cultures and the forms of social organization of the world's indigenous people", in the terms employed by the General Assembly in its resolution 49/214, and to bring the erosion of these irreplaceable cultures to a speedy end.

Annex

PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE

Elaborated by the Special Rapporteur of the Subcommission
Mrs. Erica-Irene Daes

PRINCIPLES

1. The effective protection of the heritage of the indigenous peoples of the world benefits all humanity. Cultural diversity is essential to the adaptability and creativity of the human species as a whole.

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organization.

3. Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.

4. International recognition and respect for indigenous peoples' own customs, rules and practices for the transmission of their heritage to future generations is essential to these peoples' enjoyment of human rights and human dignity.

5. Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.

6. The discovery, use and teaching of indigenous peoples' knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.

7. To protect their heritage, indigenous peoples must control their own means of cultural transmission and education. This includes their right to the continued use and, wherever necessary, the restoration of their own languages and orthographies.

8. To protect their heritage, indigenous peoples must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable, and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

GUIDELINES

Definitions

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

Transmission of heritage

14. Indigenous peoples' heritage should continue to be learned by the means customarily employed by its traditional owners for teaching, and each indigenous peoples' rules and practices for the transmission of heritage and sharing of its use should be incorporated in the national legal system.

15. In the event of a dispute over the custody or use of any element of an indigenous peoples' heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognized by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

16. Governments, international organizations and private institutions should support the development of educational, research, and training centres which are controlled by indigenous communities, and strengthen these communities' capacity to document, protect, teach, and apply all aspects of their heritage.

17. Governments, international organizations and private institutions should support the development of regional and global networks for the exchange of information and experience among indigenous peoples in the fields of science, culture, education and the arts, including support for systems of electronic information and mass communication.

18. Governments, with international cooperation, should provide the necessary financial resources and institutional support to ensure that every indigenous child has the opportunity to achieve full fluency and literacy in his/her own language, as well as an official language.

Recovery and restitution of heritage

19. Governments, with the assistance of competent international organizations, should assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage.

20. In cooperation with indigenous peoples, UNESCO should establish a programme to mediate the recovery of moveable cultural property from across international borders, at the request of the traditional owners of the property concerned.

21. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, displayed or otherwise used only in such form and manner as may be agreed upon with the peoples concerned.

22. Moveable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

23. Under no circumstances should objects or any other elements of an indigenous peoples' heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.

24. In the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the entire people associated with the territory from which these objects were removed or recordings were made.

National programmes and legislation

25. National laws should guarantee that indigenous peoples can obtain prompt, effective and affordable judicial or administrative action in their own languages to prevent, punish and obtain full restitution and just compensation for the acquisition, documentation or use of their heritage without proper authorization of the traditional owners.

26. National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits.

27. National laws should ensure the labelling and correct attribution of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned.

28. National laws for the protection of indigenous peoples' heritage should be adopted following consultations with the peoples concerned, in particular the traditional owners and teachers of religious, sacred and spiritual knowledge, and, wherever possible, should have the informed consent of the peoples concerned.

29. National laws should ensure that the use of traditional languages in education, arts and the mass media is respected and, to the extent possible, promoted and strengthened.

30. Governments should provide indigenous communities with financial and institutional support for the control of local education, through community-managed programmes, and with use of traditional pedagogy and languages.

31. Governments should take immediate steps, in cooperation with the indigenous peoples concerned, to identify sacred and ceremonial sites, including burials, healing places, and traditional places of teaching, and to protect them from unauthorized entry or use.

Researchers and scholarly institutions

32. All researchers and scholarly institutions should take immediate steps to provide indigenous peoples and communities with comprehensive inventories of the cultural property, and documentation of indigenous peoples' heritage, which they may have in their custody.

33. Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the traditional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage.

34. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of indigenous peoples' heritage, without first contacting the peoples or communities directly concerned and ascertaining the wishes of the traditional owners.

35. Researchers and scholarly institutions must refrain from engaging in any study of previously undescribed species or cultivated varieties of plants, animals or microbes, or naturally occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the traditional owners.

36. Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without identifying the traditional owners and obtaining their consent to publication.

37. Researchers should agree to an immediate moratorium on the Human Genome Diversity Project. Further research on the specific genotypes of indigenous peoples should be suspended unless and until broadly and publicly supported by indigenous peoples to the satisfaction of United Nations human rights bodies.

38. Researchers and scholarly institutions should make every possible effort to increase indigenous peoples' access to all forms of medial, scientific and technical education, and participation in all research activities which may affect them or be of benefit to them.

39. Professional associations of scientists, engineers and scholars, in collaboration with indigenous peoples, should sponsor seminars and disseminate publications to promote ethical conduct in conformity with these guidelines and discipline members who act in contravention.

Business and industry

40. In dealings with indigenous peoples, business and industry should respect the same guidelines as researchers and scholarly institutions.

41. Business and industry should agree to an immediate moratorium on making contracts with indigenous peoples for the rights to discover, record and use previously undescribed species or cultivated varieties plants, animals or microbes, or naturally occurring pharmaceuticals. No further contracts should be negotiated until indigenous peoples and communities themselves are capable of supervising and collaborating in the research process.

42. Business and industry should refrain from offering incentives to any individuals to claim traditional rights of ownership or leadership within an indigenous community, in violation of their trust within the community and the laws of the indigenous peoples concerned.

43. Business and industry should refrain from employing scientists or scholars to acquire and record traditional knowledge or other heritage of indigenous peoples in violation of these guidelines.

44. Business and industry should contribute financially and otherwise to the development of educational and research institutions controlled by indigenous peoples and communities.

45. All forms of tourism based on indigenous peoples' heritage must be restricted to activities which have the approval of the peoples and communities concerned, and which are conducted under their supervision and control.

Artists, writers and performers

46. Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.

47. Artists, writers and performers should support the full artistic and cultural development of indigenous peoples, and encourage public support for the development and greater recognition of indigenous artists, writers and performers.

48. Artists, writers and performers should contribute, through their individual works and professional organizations, to the greater public understanding and respect for the indigenous heritage associated with the country in which they live.

Public information and education

49. The mass media in all countries should take effective measures to promote understanding of and respect for indigenous peoples' heritage, in particular through special broadcasts and public-service programmes prepared in collaboration with indigenous peoples.

50. Journalists should respect the privacy of indigenous peoples, in particular concerning traditional religious, cultural and ceremonial activities, and refrain from exploiting or sensationalizing indigenous peoples' heritage.

51. Journalists should actively assist indigenous peoples in exposing any activities, public or private, which destroy or degrade indigenous peoples' heritage.

52. Educators should ensure that school curricula and textbooks teach understanding and respect for indigenous peoples' heritage and history and recognize the contribution of indigenous peoples to creativity and cultural diversity.

International organizations

53. The Secretary-General should ensure that the task of coordinating international cooperation in this field is entrusted to appropriate organs and specialized agencies of the United Nations, with adequate means of implementation.

54. In cooperation with indigenous peoples, the United Nations should bring these principles and guidelines to the attention of all Member States through, _inter alia_, international, regional and national seminars and publications, with a view to promoting the strengthening of national legislation and international conventions in this field.

55. The United Nations should publish a comprehensive annual report, based upon information from all available sources, including indigenous peoples themselves, on the problems experienced and solutions adopted in the protection of indigenous peoples' heritage in all countries.

56. Indigenous peoples and their representative organizations should enjoy direct access to all intergovernmental negotiations in the field of intellectual property rights, to share their views on the measures needed to protect their heritage through international law.

57. In collaboration with indigenous peoples and Governments concerned, the United Nations should develop a confidential list of sacred and ceremonial sites that require special measures for their protection and conservation, and provide financial and technical assistance to indigenous peoples for these purposes.

58. In collaboration with indigenous peoples and Governments concerned, the United Nations should establish a trust fund with a mandate to act as a global agent for the recovery of compensation for the unconsented or inappropriate use of indigenous peoples' heritage, and to assist indigenous peoples in developing the institutional capacity to defend their own heritage.

59. United Nations operational agencies, as well as the international financial institutions and regional and bilateral development assistance programmes, should give priority to providing financial and technical support to indigenous communities for capacity-building and exchanges of experience focused on local control of research and education.

60. The United Nations should consider the possibility of drafting a convention to establish international jurisdiction for the recovery of indigenous peoples' heritage across national frontiers, before the end of the International Decade of the World's Indigenous People.

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UNITED NATIONS

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Economic and Social Council

Distr.
GENERAL

E/CN.4/Sub.2/1995/27
31 July 1995

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention
of Discrimination and
Protection of Minorities
Forty-seventh session
Item 14 of the agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Study on treaties, agreements and other constructive arrangements between States and indigenous populations

Second progress report submitted by Mr. Miquel Alfonso Martínez, Special Rapporteur

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GE.95-13232 (E)

Introduction

1. In its decisions 1992/110 and 1993/105 of 27 August 1992 and 5 March 1993, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights, respectively, requested the Special Rapporteur to submit to the Working Group on Indigenous Populations at its twelfth session, and to the Sub-Commission at its forty-sixth session (1994), his second progress report on the present study.

2. For reasons explained by him before both bodies - which to some extent have remained valid during the months since July/August 1994 - the Special Rapporteur was unable to comply with that request. 1/

3. Notwithstanding this setback, the Working Group, on the basis of the information provided orally by the Special Rapporteur concerning the work done in that field since the submission of his first report, took the opportunity on that occasion to hold a useful debate during which more than a dozen observers made valuable suggestions for his future work. 2/

4. On the basis of the Working Group's recommendation in that regard 3/, the Sub-Commission adopted decision 1994/116 of 26 August 1994 in which, after welcoming the discussions held at the twelfth session of the Working Group, it recommended that the Special Rapporteur should make all possible efforts to submit his second progress report in 1995 to the Working Group at its thirteenth session and to the Sub-Commission at its forty-seventh session, as well as his final report to both bodies in 1996.

5. In that decision the Sub-Commission also decided, inter alia, to request the Secretary-General to give the Special Rapporteur "all the assistance necessary to allow him to continue his work, in particular by providing for the specialized research assistance required ..."(underlining by this rapporteur).

6. The Commission on Human Rights, in its decision 1995/109 of 3 March 1995, endorsed the recommendations submitted to it by the Sub-Commission.

7. Pursuant to these decisions of the Sub-Commission and Commission, and to those adopted on the subject by the Economic and Social Council in 1993 and 1995, the present report is submitted for consideration to both the Working Group at its thirteenth session and the Sub-Commission at its forty-seventh session.

8. In preparing this report, the Special Rapporteur has, as on previous occasions, taken into account to the fullest possible extent the general remarks and specific suggestions made to him both by his colleagues in the Working Group and the Sub-Commission and by observer delegations - of Governments and indigenous peoples alike - in the most recent discussions regarding this study.

9. The Special Rapporteur's objectives in this report are predicated both on a number of questions which he had previously announced would be addressed on this occasion and on the need for him now to develop further his thoughts and

views regarding a number of topics that have been highlighted through the considerable research work that has had to be carried out on the extensive documentation received since his first report.

10. These objectives are as follows:

(a) To inform the Working Group and the Sub-Commission about the research work and other activities carried out by the Special Rapporteur in the period extending from late 1992 to early 1995;

(b) To establish some basic benchmarks in respect of certain legal and conceptual matters - in particular the minorities/indigenous peoples dichotomy - that are very directly related to his practical work, especially in the forthcoming final stage of this study;

(c) To analyse the various ways in which, with the passing of time, there has been a gradual erosion of the sovereign status of indigenous nations, so clearly perceptible at the time of their first contacts with other, non-indigenous peoples, from the time of the latter's arrival on lands traditionally occupied by the former.

As a result of the progress made since the submission of the first report in investigating documentary material relating to both the historical and present-day situations singled out for analysis in 1992 in respect of Asia/Oceania and Africa, the Special Rapporteur has decided to pursue objective (c) with reference to these two regions of the world. This will fill a gap in the first report which had been brought to the attention of the Special Rapporteur. This decision by the Special Rapporteur has also been dictated by reasons of time and space, since there is a much greater volume of material relating to other regions than was used for this report. It may be added lastly that the relevance of situations in Asia/Oceania and Africa to the issues addressed in Part II was also a factor taken into account by the Special Rapporteur in giving precedence this year to analysis of the Afro-Asian problem area.

I. RESEARCH WORK AND OTHER ACTIVITIES CARRIED OUT

11. During the period between the last quarter of 1992 and the first quarter of 1995, significant progress was made with the huge amount of scientific research required by a study of this nature and scope. The Special Rapporteur again feels bound to acknowledge the key contribution made by his consultant, Mrs. Isabelle Schulte-Tenckhoff, to this task, in particular through each of the research reports produced by her in 1993 and 1995.

12. In addition to these reports, mention should also be made of another, drafted in 1994, and of a number of scientific papers published by her in various specialized scientific journals on subjects directly linked to the present study. The Special Rapporteur has been privileged to have access to these additional scientific papers, which have in a sense been inspired to some extent by her interest in the study and have directly or indirectly hinged on work relating to this second progress report.

13. All this work has been performed notwithstanding the fact that what the Centre for Human Rights was able to offer her in the way of having her duties as a consultant formally recognized through an appropriate contract fell far short of what the Special Rapporteur considers she was entitled to expect in this regard. This is particularly so if account is taken of the repeated requests addressed by the Sub-Commission, the Commission and the Economic and Social Council to the Secretary-General to give him "all the assistance necessary to allow him to continue his work".

14. As regards the analytical research work proper, noteworthy results have been achieved in respect of various areas of importance for the study. One of these has to do with understanding the very diverse roles that may have been played in their time by the so-called "Royal Companies" for maritime trade in the initial and subsequent contacts between the European dynasties and trading groups in that part of the world and the peoples of Asia and Africa. 4/

15. According to a very reliable source, 5/ some of them, like the East India Companies established by Holland and England, were "permanent legal entities ... endowed with delegated sovereign powers".

16. The same author notes that, nevertheless, in a number of cases "the position of the European trader was ... a legally complicated one, for he was strictly speaking under the territorial jurisdiction of a foreign Ruler, but at the same time under the personal and disciplinary jurisdiction of his Company, which often claimed semi-territorial and sometimes a vassal-like status within the precincts of a settlement flying its own national flag". 6/

17. In other cases, the situation resulting from negotiations with the local rulers did not involve the surrender of enclaves or territorial rights, with possible direct repercussions on the sovereignty of the States negotiating with the trading companies (whether or not they had been delegated sovereign powers by the monarchs concerned), since the only purpose of "treaties" or "arrangements" was the securing of certain trading privileges for the company in question. 7/

18. However, some of the treaties of this particular nature laid down certain conditions as to exclusive trading rights. These may be understood in the modern sense as clear restrictions on the sovereign right of the other party. Obviously, the key factor here would be the possible exercise of coercion in order to obtain the consent of that party. 8/

19. Yet even when account is taken of the fact that many of the instruments to which the aforementioned companies were parties related to the "innocent" sphere of trade and did not always jeopardize any of the sovereign powers of the peoples concerned, it should be borne in mind that the direct effect of the arrival of European traders and colonizers in Asia and Africa was the virtual breakdown of the indigenous trading system in those regions. There is thus no need to emphasize the chain of consequences this had for political, economic and social institutions in those societies.

20. This is amply documented, particularly as regards the "Royal Companies", which engaged in their activities in southern and south-east Asia. It should not be forgotten that, as was already noted in the first progress report (para. 217), this trade began to be disrupted as early as 1511, which was the year when the Portuguese conquered the port of Malacca (in present-day Malaysia) which was the centre of the trading system in the region. 9/

21. In point of fact - and this may serve as a preliminary conclusion regarding the research done to date - this is tantamount to saying that where large parts of Asia and Africa are concerned, particularly in respect of the earliest European contacts with nations then existing in both continents, the historical legacy in the matter of treaties, agreements and arrangements is to a considerable extent directly linked to the history of these "Royal Companies".

22. It should be stressed that they also, for a wide range of reasons determined by their own interest, recognized (even when they violated it by force) the sovereignty and the identity of the peoples living in the areas of interest to them, particularly areas which were important trading centres.

23. By and large, the instruments to which these companies were parties clearly establish the existence of a huge variety of peoples and territories which in a later day and age - and after going through a stage of European colonization that totally denied the sovereign powers of those that were affected by it - now form part of a large number of multi-ethnic/multinational contemporary States in those continents.

24. Needless to say, in more than a few of them problems persist that have been coped with by the most varied means. However, colonialism - which cast its long shadow over that period, in particular when the seeds of independence were being sown in those now independent multi-ethnic/multinational countries and borders were being established with other States subject to the colonialism of other European Powers - continues still today to exercise the same harmful effect upon those societies.

25. Another point on which the Special Rapporteur has been able to make significant progress, and one which is directly linked to certain legal concepts of fundamental importance for this study, concerns the further development of the premises for a non-Eurocentric concept of international law (or of the "Law of Nations" as it was known when it first emerged in the modern age). The Special Rapporteur must confess that he was himself already inclined to work along these very lines.

26. The fact that during this period the Special Rapporteur has been able to benefit from certain key ideas contained in the works of such authors as Charles Alexandrowicz, 10/ Jörg Fisch, 11/ Dieter Dörr, 12/ and M.F. Lindley 13/ (all brought to his attention by his consultant in July 1994) has proved to be of particular importance to him in arriving at a more precise picture and a fuller understanding of the extraordinary changes that occurred in the basic concepts of public international law with the spread of imperial power (European or American, but never indigenous), in respect of significant aspects of that discipline, and that are of direct relevance to indigenous peoples.

27. These aspects include the historical analysis of the various arguments - both for and against - concerning the former or continuing sovereignty of the indigenous nations; the value to be accorded to the texts of legal instruments known only through the version given of them by one of the parties involved when the two speak different languages; the effects of the so-called "unequal treaties" in the light of differences in the legal and political customs and traditions of the parties concerned; and the value (or otherwise) of the European conception of "reciprocity" in the legal arrangements made with the indigenous peoples. These are some of the areas in which new and interesting light has been shed for the Special Rapporteur by the aforementioned works.

28. Furthermore, during this period significant progress has also been made in gathering primary materials in this field. Special thanks are due to the Government of Canada (for keeping the Special Rapporteur informed of recent developments in that country), to such institutions as the American Indian Law Alliance (for providing him with extensive materials on United States legislation and case-law), and to such scholars as: O.M. Eya Nchama (for his contributions on the history of Africa), Florencia Roulet and my colleague Mario Ibarra (for their contribution regarding the historical background to the situation of indigenous peoples in Argentina and Chile) and Renate Domnick (for his comments on the case of the Western Shoshone nation).

29. It cannot be said, however, that unqualified success has been achieved on this particular score. For example, a great deal is still needed to complete the very necessary updating of the national laws applicable in this field.

30. A case in point is perhaps that of Latin America since, although the Special Rapporteur has been able, by various means, to consult draft legislation (or present-day laws and constitutional provisions) in such countries as Brazil, Chile, Honduras, Guatemala, Mexico, Paraguay and Venezuela, it is not clear to him whether these legislative bills have been adopted (and if so, whether in the same form as that in which they were available to him) or whether the further laws that would give actual effect to those constitutional provisions have already been enacted and are in force.

31. The Special Rapporteur has suffered from an all but total lack of documentation regarding the indigenous peoples in what has now become the Russian Federation, e.g. the Aleut, Chukchi, Evenki, Inuit, Nenets, Khants and Koryak nations, despite having given special attention to the contributions of some of those peoples to the Working Group's most recent sessions.

32. The widespread lack of response by the governments concerned to the questionnaire distributed (and redistributed) to them some years ago, may be said to be the chief obstacle that had to be faced in this regard.

33. However, one positive development is that, although it did not formally reply to the aforementioned questionnaire, the Government of the United States of America, in a letter addressed to the Special Rapporteur on 25 July 1994 by the Office of Legal Affairs of its Permanent Mission in Geneva, offered for the first time to collaborate with him in his work for this study.

34. To the letter were annexed a list of judgements on indigenous affairs handed down by various courts in that country and a photocopy of the text of an important chapter of one of the most highly reputed works in this field published in the United States. Both have been useful for this report.

35. A further positive development to be stressed is that, thanks to the action taken by a number of indigenous organizations, in particular the International Indian Treaty Council (IITC) of San Francisco, California, United States of America, the Special Rapporteur has begun to receive (or will be receiving in the near future) not only copious documentation regarding the difficult situations - some of them so extreme as to verge on physical extinction - affecting a large group of indigenous nations currently living in the territory of what now constitutes that country, but also replies to the aforementioned questionnaire.

36. The explanatory leaflet prepared by that indigenous non-governmental organization concerning the questionnaire (in collaboration with the Special Rapporteur) has been an essential factor in this major development. He expresses his thanks to the IITC for this valuable contribution to his work and for having taken very seriously the appeal made by him in this connection in his first progress report. 14/

37. With regard to the important matter of fieldwork, the Special Rapporteur must again express his appreciation of the effort also made by the IITC to help arrange an extensive tour for him through eight States in the United States of America (Arizona, California, Minnesota, New York, New Mexico, Oklahoma, South Dakota and Washington) in the autumn of 1994.

38. The information gathered during this tour, in particular at the public hearings held in each of those States, which were attended by many representatives of indigenous nations who spoke about their problems, is of outstanding importance for present and future work relating to this study.

39. The Special Rapporteur is also grateful for the invitation extended to him by the Grand Council of the Crees (of Quebec), which enabled him to visit various communities belonging to that nation in the autumn of 1993. On that occasion he was able to assess the enormous degree of deterioration in the environmental and living conditions of the various communities visited (and of their ability to develop their traditional economic activities) caused by the construction of a gigantic hydroelectric power plant, as a result of the application of certain provisions of the James Bay and Northern Quebec Agreement.

40. Regarding also the situation of the indigenous nations now living in Canadian territory, the Special Rapporteur had the honour to be invited by another important indigenous non-governmental organization based in Ottawa (the Assembly of First Nations) to attend a seminar on the rights deriving from the indigenous treaties existing in that country, held in the winter of 1993.

41. Thanks to the President of the Assembly, Mr. Ovide Mercredi, he also had an opportunity on that occasion to attend a working meeting of the Royal Commission on Aboriginal People, established by the Canadian Federal

Government, and to engage in wide-ranging talks on matters directly related to this study with Mr. George Erasmus, co-chairman of that Commission. Profiting from his stay in the Canadian capital, he was also able, on the proposal of the Canadian Ministry of Foreign Affairs, to have talks with senior officials of that Ministry and of the Ministries of Justice and Constitutional Affairs. At that meeting, questions relating to the study were likewise discussed.

42. Lastly, the Special Rapporteur wishes to thank the authorities of the Raoul Wallenberg Institute of the University of Lund, Sweden, for the invitation that allowed him to attend a seminar on indigenous affairs sponsored by that institution in the summer of 1994. During the discussions, particular aspects and possible future repercussions of the present study were usefully examined.

43. Not all the fieldwork proved as profitable as could be expected. The Special Rapporteur's second visit to the Archivo de Indias in Seville, Spain, in late autumn 1992 was disappointing in terms of the search for documents. Contrary to the information available, the archives for that period had not yet been fully computerized, making the search for specific legal documents exceedingly difficult and frustrating. Nevertheless, he took the opportunity to copy valuable information from the excellent bibliographic holdings existing in that institution.

44. It should also be mentioned that, for reasons of both work and health, the Special Rapporteur was unable to complete a series of missions in the field which would without any doubt have contributed in no small measure to this second report.

45. By way of information, mention may be made firstly of the invitation from Mrs. Rigoberta Menchú Tum, Nobel Peace Prize winner, to attend the Second Assembly of the Indigenous Initiative for Peace (UNESCO, Paris, February 1995) and that extended by the IITC to visit indigenous communities in the States of Alaska and Hawaii.

46. The Special Rapporteur also wishes to express his regret to the authorities of the Canadian Bar Association and to the Treaty Four nations in that country at not being able to accept their kind invitation to visit them (also in February of the current year). For the same reasons, he had to postpone the working visit scheduled for this year to the Vatican archives (suggested by various indigenous representatives at the twelfth session of the Working Group). 15/

47. With regard to possible future activities of this kind, the Special Rapporteur is confident that both the local government authorities of Greenland and the Consejo de Todas las Tierras of Chile will be able to work out the details of the invitations extended by them respectively some time ago to visit their lands. He also ventures to express the hope that this will be arranged in sufficient time for him to be able to incorporate his findings into his final report.

II. SOME REFLECTIONS ON THE MINORITY/INDIGENOUS PEOPLE DICHOTOMY

48. In his preliminary report on this study (1991), the Special Rapporteur felt obliged to say how important, from the outset of his work, he had found the conceptual distinction between these two groups of human beings and the practical consequences for his future work that stemmed from that distinction. He put it as follows:

> "[The Special Rapporteur considered] ... that both in the data-gathering phase of his work and in his analysis of the results obtained, he should strictly adhere to the practice followed in work in this sphere of distinguishing between 'minorities' and 'indigenous populations' (peoples) (author's underlining). He is very much aware of the degree of discretion that he will have to exert because of this decision and the practical difficulties inherent in it. Nevertheless, he is confident of being capable of differentiating the latter with total objectivity and sound reasoning." 16/ (underlining by this rapporteur).

49. He pursued this idea, stressing that it would continue to be a guideline for his work on all matters related to the study until the completion of his mandate. 17/

50. Besides this, and bearing very much in mind the course of discussions within the Commission on Human Rights, the Commission's decisions on his mandate and his exchanges of views with many representatives of Governments and indigenous peoples attending discussions in the Working Group, the Special Rapporteur has always been very aware of the universal scope of his tasks.

51. Both in the initial outline of the study 18/ requested of him by the Commission 19/ and the Council 20/ and in the preliminary report mentioned above, 21/ the Special Rapporteur reaffirmed the worldwide nature of his mandate. He re-emphasized it in 1992 in his first progress report. 22/

52. Describing the geographical scope of this study, he repeatedly emphasized that he felt obliged, in his investigations, to explore possible situations in all parts of the world that might relate to the tasks entrusted to him by the Sub-Commission, the Commission and, ultimately, the Economic and Social Council.

53. It was on this basis that, in deciding - among the enormous number of cases and situations that might potentially fall within his terms of reference, none of them yet documented - which could serve as points of departure to give a focus to his future investigations, the Special Rapporteur covered in his first progress report a large number of situations (41) 23/ that he regarded as being prima facie representative of the five different categories 24/ which he considered (and continues to consider) fell within his mandate. Those selected on that occasion related to every geographical region on the planet.

54. Being, however, fully aware of the limitations that his efforts to assemble documentation still displayed in early 1992, he stressed at that time the purely indicative nature of his selection of situations. The selection,

as he put it in his progress report, "could not be fully balanced in terms of the amount of data available, analytical results or regional representativity". He concluded his discussion of the matter by pointing out that "obviously the cases reviewed in this progress report will not be the only ones which will contribute to the final conclusions of the study". 25/ (underlining by this rapporteur).

55. Given this background, various factors that have recently emerged have added to the importance that the Special Rapporteur attaches to clarification of the aforesaid minority/indigenous people (nation) dichotomy.

56. On the one hand, he has been able greatly to extend his knowledge not only of the circumstances that shaped relations and the formulation of legal agreements (original and subsequent) between indigenous and non-indigenous peoples in widely different parts of the world in the past, but also of the agreements arrived at by indigenous populations themselves among one another in certain parts of the world (notably, though not exclusively, in Asia and Africa).

57. Of particular relevance to these new insights was the possibility of enlarging his vision of the struggle between the European colonial Powers in Asia, Africa and the Americas, from the sixteenth century onwards, to impose their own political and economic hegemonies in what today is called the Third World; and also regarding the active involvement of those same colonial Powers in the processes which have led to the existence today, as sovereign entities, of a large number of multi-ethnic/multinational States in Africa and Asia.

58. The repercussions of that involvement on many of the problems now facing certain ethnic groups in those States are undeniable.

59. Moreover, the laudable flexibility of the rules laid down at the outset by the Working Group to govern participation in its discussions, the increasing prominence its activities enjoy in the eyes of international opinion and the financing options available through the Voluntary Fund for Indigenous Populations have enabled (and stimulated) a wide variety of human communities from all corners of the world to come to Geneva and assert their status as indigenous peoples.

60. Lastly, other activities by United Nations bodies (e.g. the Commission on Human Rights) or special rapporteurs on specific subjects or countries (such as those on Sudan or on the concept of minorities) have - in the Special Rapporteur's opinion - served to create confusion regarding certain key questions relating to this minority/indigenous people (nation) dichotomy.

61. These concerns have prompted the Special Rapporteur to share with the Working Group and the Sub-Commission, through this report, some of his thoughts on a situation which, in his judgment, if not carefully thought through, might yield counterproductive results on a subject of major concern to the Group, the Sub-Commission, the Commission and the Council, especially since the establishment of the Working Group in 1982, namely the elimination of discrimination against indigenous peoples and the restoration or implementation of their rights, including their human rights.

62. These thoughts stem from an important consideration: the elements available for the attempt to define minorities, on the one hand, and indigenous peoples (nations) on the other.

63. At the outset it must be stressed that the international legal community - basically composed of the States that are members of the United Nations system - has never yet defined what constitutes either "peoples" (which, the Charter itself says, have the right to self-determination) or "minorities" or "indigenous peoples".

64. Fortunately, however, the pragmatic sense that guides the efforts of that community has not prevented it from adopting international agreements of notable breadth employing such terms, for example, as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

65. It therefore logically follows that the want of a formal definition of an "indigenous people" cannot impede the future adoption of the current draft United Nations declaration on the rights of indigenous peoples, which the Sub-Commission has already commended to the governmental bodies of the United Nations system.

66. Still, there are points of reference, both for minorities and for indigenous peoples or nations.

67. In the case of minorities, the points of reference are the attempts to formulate a definition made by the Italian professor, Francesco Capotorti, and later by the Canadian judge, Jules Deschênes, in both cases at the urging of the Sub-Commission.

68. According to Capotorti, a minority is "a group which is numerically inferior to the rest of the population in a State, and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language". 26/

69. Deschênes, for his part, describes it as follows: "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law." 27/

70. The similarities and differences between the two approaches are obvious. The authors agree on the notion of these groups of people as numerical minorities; on their non-dominant position in the social fabric; on their shared ethnic, religious or linguistic traits; on the sense of community that moves them; and on the collective will to survive in accordance with their traditions and style of life.

71. But Capotorti's basic emphasis seems to be on numerical inferiority, while Deschênes stresses both the status of these groups - perhaps in the light of the greater diversity in Canada - as "citizens of a State" and, curiously, the quest for "equality ... in fact and in law" vis-à-vis the majority in their respective societies.

72. It is worth adding that Capotorti's definition could be applied to indigenous peoples as well as minorities, if general public pronouncements in many different parts of the world are taken into account. In contrast, Deschênes' criterion could validly be interpreted as distinguishing between the two categories if one considers how the latter part of his definition is worded.

73. According to Deschênes, legal equality with the "majority" would be possible only on the basis of the legal institutions of the majority/dominant sector in the multinational society in question, not as a derivative of the legal culture of the "minorities".

74. It need hardly be said that such a renunciation of a crucial part of their culture (including their own legal and political institutions) is, understandably, anathema for a wide range - very probably the majority - of indigenous peoples, as was well known before Deschênes' work appeared.

75. In a way, the 1992 Declaration 28/ was the logical extension of article 27 of the 1966 International Covenant on Civil and Political Rights, which states:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

76. Since the entry into force of the Covenant, in 1976, this stipulation, in conjunction with the Optional Protocol to the Covenant, has continued to be the focal point of possible international protection for minorities on account of the nature of the formal legal obligations undertaken by States becoming parties to these agreements.

77. According to the authors of a recent article on the subject, the International Covenant, the Protocol and the Declaration, taken together, make up "a programme, when compared with the first multilateral regime for the protection of minorities established under the League of Nations"; their shortcomings are, nevertheless, critically commented upon. 29/

78. Although the Special Rapporteur can understand the reasons for it, the main shortcoming to be found in the three international agreements - as regards the possibility of securing effective international protection for minority rights - is, in his view, that the rights they acknowledge and the protection they accord are, in the strict sense, applicable only to the members of such groups as individuals, not to the group of people as such and

considered in its entirety. This despite the fact that articles 1 and 4 (the first sentence of subparagraph 4) of the 1992 Declaration contain certain references to minorities as entities considered as a whole.

79. In other words, the prevalent notion in those texts is one of individual rights as the focus for possible international concern over human rights, as has been fashionable in the United Nations since the groundwork was clearly laid down in the Universal Declaration of Human Rights in 1948. 30/

80. This approach - whose limitations need not be dwelt on - remained virtually the only one, conceptually and practically, in the field until relatively recently, when many "Third World" States and countries from the now-defunct "socialist camp" argued successfully for recognition of "collective rights" in practical United Nations activities.

81. It is worth mentioning here how much importance indigenous peoples justly attach to recognition of their collective rights - rights enjoyed by social groups as such, as collectives considered in their entirety, as a whole, and as specific entities - the latter in the sense of entirely distinct societies in cases where there exists a multi-ethnic/multiracial social context.

82. It should also be mentioned - as Schulte-Tenckhoff and Ansbach have done 31/ - that in the case of minorities, the absence of a definition applies not only to the term in general but also to the adjectives used to qualify it (i.e. national, ethnic, religious, cultural and linguistic), as a consequence, they say, of the "wide geographical and historical diversity" of these groups.

83. Schulte-Tenckhoff and Ansbach also emphasize that, despite the proliferation of adjectives, United Nations activities have always - controversially, for some - excluded migrant (geographical) workers from minorities, 32/ as they have (at least up to now) indigenous peoples (nations) (or "indigenous populations", to use the term generally employed by the various United Nations bodies other than the Working Group).

84. In conclusion - on anything but weak grounds - they accept "the impossibility of arriving at a definition of minorities", at least for the time being. They reason that, though the search for such a definition may be an eminently political undertaking in which the widely divergent interests of the States that must come to grips with the task in the United Nations collide, it is an undertaking fraught with practically insuperable difficulties; accepting the fact that, needing to essay the (im)possible uniform treatment of innumerable specific situations, "the protection of minorities, United Nations-style, tends to favour a practical approach which tends to consider only those aspects of the problem to which it appears possible to offer a solution". 33/

85. As regards the definition of an indigenous people or nation, the situation is somewhat different. First, there is a "working definition" put forward in his compendious work 34/ by the Ecuadorian expert, José R. Martínez Cobo, who was commissioned, as a Special Rapporteur, to produce a study on the problem of discrimination against indigenous populations.

86. It would appear important, in the context of this chapter, to recall how Martínez Cobo expressed his ideas on the subject. He did it as follows:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." (underlining by this rapporteur).

87. This "working definition" forms part (para. 379) of chapter XXII ("Proposals and recommendations") in the third (and last) part of his final report (entitled "Conclusions, proposals and recommendations"), and can be found in section F of that chapter (paras. 362 to 382).

88. In order fully to comprehend both the nature and the underlying sense of the formulation employed by the Ecuadorian Special Rapporteur in his monumental work, 35/ the contents of the said section F, of which it forms part, need to be analysed in their entirety.

89. Such a review is all the more necessary if one remembers that - in contrast to what happened to the definitions of minorities put forward by Capotorti and Deschênes - two non-governmental bodies (the Working Group and the Sub-Commission) and one governmental organ (the Commission) not only adopted in toto the "Conclusions, proposals and recommendations" in volume V of the final report but also accepted them as the basis for future work on the problems of indigenous peoples by such dissimilar United Nations forums as those mentioned.

90. The views that Martínez Cobo offers on his "working definition" are particularly clear. Reminding us that arriving at it was a "extremely complicated, difficult and delicate task" (para. 363), he describes it as "a purely provisional formulation" (para. 365) (underlining by this rapporteur).

91. He then added that the succeeding paragraphs - which include, of course, the one containing his formulation of the term "indigenous populations" - offer "only tentative concepts and criteria for placing on the table as merely preliminary and provisional efforts on the basis of what are felt to be the relevant criteria". And he ends:

> "They are for use as a point of departure and for criticism and modification in the approach to more precise draft definitions of the concept of indigenous populations. [They] are intended, therefore, simply to stimulate reflection and analysis leading to the formulation of more formal proposals for definitions. The latter should, in turn, ultimately give rise to a universally acceptable definition of indigenous populations ... [which] can and should be used as a guide ... [for]

concrete rules defining the ... rights and ... freedoms of indigenous populations, for it will be essential to know which population groups are meant ..." (paras. 366 and 367) (underlining by this rapporteur).

92. Martínez Cobo devotes the succeeding paragraphs (368-377) to "a number of basic ideas" providing the intellectual framework that, in his view, must underpin the process of definition in the multinational/multi-ethnic societies within which these peoples now live. His key ideas in this respect are:

(a) Indigenous peoples must be recognized according to their own perception and conception of themselves in relation to other groups coexisting with them in the fabric of the same society;

(b) There must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies;

(c) The right of indigenous peoples to define what and who is indigenous, and the correlative, the right to determine what and who is not, must be recognized;

(d) The power of indigenous peoples to determine who are their members must not be interfered with by the State concerned, through legislation, regulations or any other means;

(e) Artificial, arbitrary or manipulatory definitions must be rejected;

(f) The special position of indigenous peoples within the society of nation-States existing today derives from their historical rights to their lands and from their right to be different and to be considered as different.

93. Describing the depredations on their land and the constant attacks on their culture in general and their social and legal institutions and systems within the societies in which they nowadays live, Martínez Cobo mounts a vehement defence of these peoples' right to "continue to exist, to defend their lands, to keep and transmit their culture, their language, their social and legal institutions and their way of life, which have been illegally and unjustifiably attacked" (para. 374). He further emphasizes that "it is clear that indigenous peoples consider themselves to be different from the other groups that form the society of present-day nation-States in which they now find themselves included" (para. 376) (underlining by this rapporteur).

94. In his view, "it is in the context of these situations and these rights that the question of definition should arise" (para. 375) - a position shared by this Special Rapporteur. The latter does not, of course, propose to tackle a task of such proportions in this report. He feels he has neither the intellectual baggage and experience for the job, nor the mandate to undertake it.

95. He has sought to provide an extensive summary of Martínez Cobo's arguments in this report precisely because in his opinion one of the ideas presented both in paragraph 376 and in the "working definition" Martínez Cobo puts forward has to some extent helped - especially when taken out of the

general context of the discussion in the aforementioned section F - to blur the clear dichotomy between minorities and indigenous populations to which this chapter relates. Even the correct idea that indigenous peoples have the right to define for themselves what and - especially - who is indigenous (see above, para. 92 (b)) has served to complicate this vital question further.

96. The progress he has made in his investigations has convinced the Special Rapporteur that the practical consequences of this confusion have a bearing on his mandate. He therefore proposes to expound below his own thoughts on the subject, thus taking up Martínez Cobo's call for critical analysis of his "tentative concepts and criteria" and "merely preliminary and provisional efforts", as he himself describes his final "working definition" of indigenous peoples.

97. In his quest for an "ecumenical" definition of indigenous peoples that might apply as far as possible to all the cases brought to his attention before (and during) his mammoth undertaking, Martínez Cobo - consciously or unconsciously - tends to lump together situations that this Special Rapporteur believes ought to be differentiated in view of their (to him) evident and intrinsic dissimilarities.

98. Thus in paragraph 376, in the context of indigenous peoples' logical sense of being different from the other groups with whom they are obliged to coexist in many present-day States, we read:

> "[Indigenous peoples] consider themselves to be the historical successors of the peoples and nations that existed on their territories before the coming of the invaders of these territories, who eventually prevailed over them and imposed on them colonial or other forms of subjugation, and whose historical successors now form the predominant sectors of society" (underlining by this rapporteur).

99. With this as his starting-point, Martínez Cobo quite consistently identifies as "indigenous populations", in his "working definition" (as may be seen in para. 86 above), all communities, peoples and nations which, among other traits, possess "historical continuity with pre-invasion and pre-colonial societies ...". 36/

100. From the conceptual viewpoint, however, it would appear advisable to begin by differentiating between two - markedly different - situations, which are put on the same plane and appear to have equal implications in the aforementioned texts: namely invasion (which presumably includes invasion by other indigenous peoples) and the European colonial phenomenon in Latin America, Africa and Asia.

101. Both problems are linked to the acquisition of land; 37/ but, as Schulte-Tenckhoff 38/ rightly points out, it would be wrong to place on the same footing the phenomenon of territorial expansion in general and the unique and specific historical fact of the organized colonialization of peoples of other continents by the European Powers, starting in the sixteenth century.

102. Expansion (in the context of Martínez Cobo's definition) is linked to a wide variety of factors that are usually difficult to predict or control, such

as the depletion of resources in particular areas, social tensions and demographic pressures. The root causes of the original European drive to acquire colonies, such as control of trade, the urgent need to obtain resources for wars against other neighbouring Powers and, above all, the lure of gain and the need to expand markets as substantive and essential components of a new pattern of production and of social relations of a universal character, are very different.

103. Another important writer 39/ draws attention to a significant characteristic that differentiates between the two situations, particularly when one considers the historically established territorial expansion by some indigenous peoples moving into the territories of other indigenous groups, especially, but not exclusively, in what is known as the "Third World".

104. According to Williams, the main feature of expansion is that there are "many basic similarities" between the expanding society and the peoples at whose expense the expansion takes place. When the process of expansion also leads to the securing of political control over such territories, it "usually results in the incorporation of the inhabitants into the body politic" of the nation which has expanded. He gives the example not only of the cases of the Iroquois Confederacy (Haudenasaunee) and the Navajo nation in relation to their neighbours, but also those of the incorporation of the Scots by the English and of the Cajun population of French origin living in Louisiana by the United States. This example does not, of course, exhaust the list of possible historical European examples.

105. Rather, according to the same writer, the European colonial problem "involves the conquest and control of culturally different peoples who are so dissimilar that they cannot be easily incorporated [into the dominant nation], but must be ruled as subjects outside the political process" (underlining by this rapporteur). In his opinion, the best example of this type of situation is to be found precisely in "transplanted settler nations like the United States". 40/ Other examples may be found not only in North America, but also in Central America and South America, as well as in Australia, New Zealand and certain parts of northern Europe.

106. Even the European colonial phenomenon requires further analysis, because the situation was not identical in all cases. For example, in 1985, Rodolfo Stavenhagen 41/ advocated a diversified approach to the idea of colonial societies, stating that:

> "A distinction should be made between different types of colonial societies and the way these have affected indigenous peoples. For example, in European settler societies (such as the United States and Australia), the situation of the indigenous was different than in those colonies where only the administration and the export economy were controlled by the Europeans, but the native social structure was left relatively untouched (as in most African and Asian colonies of the French, British, Dutch and Portuguese empires). These colonies, in turn, differed from those where the early settlers merged with the local population and where new social and cultural structures developed (as in Spanish America and the Philippines)."

107. Another necessary clarification - since we are dealing with the so-called "question of ethnic minorities" and the predominant influence that many Eurocentric concepts of the indigenous problem have had until the present time - relates to the differences that can be clearly observed in the development of "nation-States" in the different parts of the world.

108. In its historical process of development, the European State has until now been portrayed, rightly or wrongly, 42/ as a "mono-ethnic State": one people, one State. Hence the obvious corollary of the problem of "traditional" minorities, which, historically at least, may be defined as individuals who live outside the State in which their people is politically organized.

109. By contrast, the vast majority of African and Asian States are intrinsically and inevitably multi-ethnic, to a large extent, particularly in the African case, as a result of the arbitrary drawing of national borders, which, it should be recalled, were not decided on by the Africans themselves, but, in nearly all cases, by the various European colonial empires or, in other words, on the basis of how those empires agreed to divide the continent up following the 1885 Congress of Berlin.

110. The fact that the territory in which an ethnic group had lived from time immemorial and in which it carried on its traditional way of life should be divided up by the colonial administration and remain so on completion of the "process of decolonization" was not, of course, a matter of great concern to those European Powers at the time of the above-mentioned agreements, which continued to delimit the territories of the new decolonized States.

111. It is obvious that, in some African and Asian States, conflicts between different ethnic groups are a painful fact of life; and it may even be argued that, in those States, a definitive and fully satisfactory solution has yet to be found to the problem of proper political participation by all the different peoples and ethnic groups that compose them. 43/

112. Although many nation-States on all continents admit the existence of "national or ethnic minorities" within their borders, it is not clear that all these human groups constitute minorities, at least in the traditional sense in which the term has been used. Even more problematic - for the Special Rapporteur, at least - is the fact that, in some cases, the label of "indigenous peoples" may be the right one for justifying their internal political activity or their daily more visible international presence. The situation of these human communities may quite possibly be a problem whose conceptual determination is still to be defined.

113. It should be recalled that, in colonial times - and even in post-colonial times, as in the case in Latin America - "indigenous" was the term used by foreign colonizers to set themselves apart from the native peoples and that this term continued to distinguish those peoples from the "criollos" who took over from the colonizers as the dominant power in post-colonial society.

114. However, the end of traditional colonial power in Africa and Asia necessarily and radically changed the concept of what was meant by "indigenous" as a result of a new political context whose most visible symbol

was the independence of the State. In this new context, the reins of political power (but not always of economic power) were taken over by ethnic and national social groups whose indigenous status was (and is) as unquestionable as that of other ethnic groups or nations which, although also living in the territory of the new State, did not emerge from the process of decolonization as the dominant sectors of this new political entity which demanded and obtained its international recognition - as a member, for example, of the United Nations.

115. Thus from a conceptual point of view, the question of establishing or re-establishing a clear-cut distinction between indigenous peoples, on the one hand, and ethnic or national minorities (or "tribal peoples", to use the terms of ILO Convention No. 169), on the other, is a basic necessity for the Special Rapporteur and a task to which he will devote even greater efforts in the final phase of the study entrusted to him.

116. For the time being, it is sufficiently clear to him that, although indigenous peoples are, in nearly all cases (but certainly not in all cases in Latin America), numerical minorities in the "national" States in which they now live (and share some of the characteristics attributed to "minorities" in some of the definitions that have been offered), they are not minorities within the United Nations meaning.

117. The foregoing is true for a wide variety of historical reasons which are developed below and because of the distinction that has usually and traditionally been drawn between them both in the United Nations (proof being the Working Group's establishment in 1982) and in its predecessor, the League of Nations. 44/

118. It is also obvious to the Special Rapporteur that a national or ethnic minority is not, on that ground alone, an indigenous people. Recently, however, the confusion between them and the category of "indigenous peoples" has become quite common both in academic circles and even as a result of some activities within the United Nations itself.

119. Various factors have contributed to this confused situation. As has been seen, some elements of Martínez Cobo's "working definition" have helped to create it. There is also a tendency to focus on or associate "indigenous" status with the practice by many different peoples of certain "traditional" cultural and socio-economic lifestyles that are "different" from those of modern industrial society, with its technology and sophisticated patterns of consumption. 45/

120. The fact that various indigenous groups have applied to the Human Rights Committee because they consider it entirely impossible that they will have any chance of success in asserting their rights before the bureaucracy (or the courts) of the States within whose borders they now live - on the basis of article 27 of the International Covenant on Civil and Political Rights (relating to the individual rights of persons belonging to minorities) and the Optional Protocol thereto 46/ - and the fact that the Committee has ruled in this regard have certainly not helped to dispel that confusion, but have actually increased it.

121. Moreover, the distinction between minorities and indigenous peoples which the United Nations strengthened by establishing the Working Group has, to some extent, been blurred by the "universalization" (to use Schulte-Tenckhoff's words) of access to the Working Group which has been actively promoted by the United Nations itself and, in particular, by its policy of granting subsidies (travel costs and living expenses in Geneva) to representatives of self-proclaimed "indigenous peoples", whose status as such (particularly in the case of some persons from Africa and Asia) is, in the Special Rapporteur's opinion, not always fully established. 47/

122. In addition, some of the criteria included in a document for general consumption on indigenous peoples which was published by the United Nations, 48/ and which contains some particularly controversial views in this regard, is another element that has gone a long way towards spreading confusion and creating justified suspicion (in both governmental and non-governmental circles).

123. Lastly, it should be pointed out that the growing confusion in this regard has also been created by the tendency - which is visible in the work of one particular United Nations Special Rapporteur - to regard as "indigenous peoples" certain ethnic groups in African countries which at most might possibly be regarded only as national or ethnic minorities (as, for example, in the case of the Sudan). 49/

124. It should nevertheless be noted that a recent initiative by the Sub-Commission (endorsed by the Commission on Human Rights last March) may be useful in clearing up some of the prevailing confusion. It is contained in Sub-Commission resolution 1994/4 of 19 August 1994 and Sub-Commission decision 1994/115 of 26 August 1994 calling for the establishment of a working group "to examine, inter alia, peaceful and constructive solutions to situations involving minorities". This new body would have to exist side by side with the Working Group on Indigenous Populations and serve as a practical element in distinguishing between the two groups of problems. 50/

125. Despite this confusion which the Special Rapporteur perceives in respect of the minorities/indigenous peoples dichotomy and which is so much a matter of concern to him, there are elements that will help to guide him in his future work and, in particular, with regard to the priority direction to be given to his efforts.

126. There is no doubt in his mind that, in the final phase, the emphasis of the study should be on cases and situations in which the "indigenous peoples" category is already established beyond any doubt from a historical and modern-day point of view; and that his conclusions should be based primarily on the experience gained on the basis of the study and of the potential inherent in three of the five types of situations he has defined as being related to his mandate, 51/ namely: (i) treaties concluded between nation-States and indigenous peoples (particularly in the Americas and New Zealand); (ii) the "constructive arrangements" in which indigenous peoples have taken part; and, naturally, (iii) the current status of peoples who are not covered by any other of the types of situations mentioned.

127. The justifications for such conclusions are both legal and historical. On the one hand, there is no need to emphasize how important the problem of the so-called "indigenous treaties" has been for this study from the outset, on the basis of the "Conclusions, proposals and recommendations" contained in the study prepared by Martínez Cobo. 52/

128. As one academic points out, moreover, it is precisely in the cases referred to in paragraph 126 (i) above that "the indigenous problem and the problem of treaties overlap and sometimes become confused, something that happens only rarely in the Afro-Asian world. In other words, the majority of communities [according to the criteria referred to in another part of the study] which might be characterized as indigenous in Africa and Asia are precisely not those which have a treaty relationship with a State, within the meaning of the study; rather, many legal-political entities [on these two continents] which are parties to colonial-era treaties nowadays represent themselves as independent States" 53/ (underlining by this rapporteur).

129. The foregoing only confirms some of the views which the Special Rapporteur expressed in his first progress report, although with some hesitation:

> "For the purpose of the study, one must bear in mind that contrary to North America, Australia and New Zealand, where a white settler population has gradually taken over from indigenous peoples (who for all basic practical purposes have been reduced to 'numerical minorities'), present-day African States - with the sole exception of South Africa 54/ - are governed by their indigenous inhabitants." 55/

He went on to state:

> "It should be added that what was stated above ... in regard to Africa, is also applicable to Asia; all States in the region are ruled by autochthonous Governments as a result of the decolonization process and the struggle for national liberation. This, of course, does not preclude the existence of a number of minorities or indigenous peoples in the multinational States of the region." 56/

III. FROM THE STATUS OF SOVEREIGN PEOPLES TO THAT OF VASSALS, WARDS OR ASSIMILATED OR MARGINALIZED PEOPLES

130. In his first progress report, the Special Rapporteur reached the conclusion, on the basis of numerous treaties concluded between the parties, that in North America under French and English colonization - the region for which the largest volume of information was available to him at that stage in his research - there was incontrovertible evidence that during the first two and a half centuries of contacts between the European colonizer and indigenous peoples the Europeans recognized "both the international (not internal) nature of the relations between both parties, and ... the inherent international personality and legal capacity [of those peoples] ... resulting from their status as subjects of international law in accordance with the legal doctrine of those times", and the status of those peoples as "sovereign nations, with all the legal implications that such a term had at the time in international relations". 57/

131. He later added that "there are elements leading to a similar conclusion with respect to the early contacts of the Portuguese, Dutch, French, Spanish and British parties in Africa, Asia and Oceania". 58/

132. At the time, he also noted "it is also true that since the early decades of the nineteenth century one witnesses (at least in those same regions) a clear trend in nation-States aimed at divesting those nations of the very same sovereign attributes and rights; particularly their land rights". 59/

133. In the face of such a conclusion - whose importance for the purposes of this study cannot be overemphasized - that report drew attention to the need thoroughly to investigate how so dramatic a change and so complete a retrogression had occurred, through an examination of the historical and contemporary developments which had led to that retrogression, and of the juridical reasoning on which the present international situation of indigenous nations is based. 60/

134. This is the background to the central objective of this part of the report. As has already been observed elsewhere in the report, advances with research into the so-called "Royal Companies" (see paras. 14-22 above), together with the Special Rapporteur's deeper knowledge of the role played in Africa and Asia by the European Powers in the transition of many countries on those continents towards independence (paras. 24 and 110 above), and his access to the thinking of jurists with which he was barely acquainted or wholly unfamiliar (para. 26 above) and, finally, the significant progress made in collecting primary sources, have made it easier for him to undertake this complex task and to confirm many of the initial conclusions reached by him in his 1992 report.

135. The process of depriving indigenous nations - either fully or substantially - of three of the four essential attributes on which their original status as fully sovereign entities was founded (i.e. their territory, their recognized capacity to enter into international relations and their specific forms of government) did not follow the same course in the various regions of the world, nor, naturally, did it assume the same characteristics in each of them.

136. The process took a variety of forms, depending both on local circumstances and on the requirements of the non-indigenous element in the bilateral relation that was established; it also depended on the specific characteristics of the indigenous party to the relationship. The impossibility of analysing each and every one of those variants is clear enough not to require an explanation.

137. Accordingly, although the Special Rapporteur is keenly aware of the difficulties and possible omissions this approach entails, he has been compelled to attempt to generalize, identifying for each region the principal characteristics of that process of retrogression which developed in the various parts of the world; he has chosen to illustrate the process in each region by those examples in respect of which his research has progressed furthest, from among those described in his first report. 61/

138. Wherever possible, the Special Rapporteur has endeavoured to employ examples drawn from the five types of situation he believes to be relevant to his mandate. 62/ However, in view of their intrinsic importance for the study (see para. 127 above) he has given priority to situations deriving from the treaties concluded between those indigenous nations and their European counterparts.

139. In order to comprehend these situations it is necessary first of all to review a number of concepts concerning major features of the history of international law which have been put forward by a number of authors who have focused their attention on contractual relations of this type between indigenous peoples and the European colonists. The Special Rapporteur believes that these concepts are relevant to this part of his task.

140. Historians of international law have devoted scant attention to the history of a universal theory of international law (or of the law of nations). One noteworthy exception is Charles Alexandrowicz, 63/ who is considered to be one of the most eloquent proponents of a non-Eurocentric approach to the history of international law, in particular where Africa and Asia are concerned.

141. Other specialists of the history of international law, such as Jörg Fisch 64/ and Dieter Dörr, 65/ have adopted a similar approach. Both of them are the intellectual heirs of M.F. Lindley, 66/ an author of the previous generation.

142. When Lindley analysed the issue of the sovereignty of what were in his day known as "backward peoples", he was able to identify three schools of thought, i.e.: (i) that which recognized their sovereignty (represented, inter alia, by Vitoria and Grotius); (ii) that which recognized their sovereignty, albeit conditionally (as advocated, for example, by Vattel and Martens) and (iii) that which denied it (a view held by authors such as Westlake and Oppenheim). In 1926, he made the following observations in this regard:

> ... "Comparing these three schools of thought, we see that, extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights." 67/

143. For his part, Alexandrowicz made the same observation, albeit more radically. In his view, until the middle of the nineteenth century a non-discriminatory and universal concept of international law, based on natural law, which considered all organized political entities (including those beyond the seas) as free and equal prevailed. This approach was

superseded by a positivist, Eurocentric and discriminatory doctrine which not only denied the international legal personality of the non-European Powers, but moreover considered their territories to be *terra nullius*. Accordingly, his view is that "the way in which the development of the family of nations has been described in nineteenth- and twentieth-century treatises of international law calls for reconsideration". 68/

144. Many of the concepts and ideas advanced in this connection by Alexandrowicz were deeply influenced by his knowledge of the situation that developed in Asia between the sixteenth and the eighteenth centuries; that situation may not be comparable to those in other regions of the world during the same period, or to the situation that obtained in Africa at the end of the nineteenth century. Furthermore, at no point did he address the evolution of situations in the United States.

145. Where treaties, in particular, are concerned, Alexandrowicz's work provides extremely valuable information on the activities of the Dutch East India Company (VOC), which managed to displace the initial Portuguese presence in most of this subregion, and on those of the English East India Company.

146. Where the important question of treaties between equals, in contrast to "unequal treaties", is concerned Alexandrowicz himself categorically observed that "treaty-making was and is ... one of the essential attributes of external sovereignty, and thus politically organized communities concluding treaties on a footing of equality with sovereign entities must be presumed to have a measure of independent juridical existence in the international field". 69/

147. Nevertheless, regarding the assumption (for which there is widespread support) that unequal treaties affect the sovereignty of one of the contracting parties, Alexandrowicz reaches the conclusion - from his interpretation of the views of classical authors in this field - that "a great number of treaties originating from the pre-nineteenth century were either *equal treaties* or, if they were *unequal* and imposed transitory or permanent burdens on the contracting (indigenous) Rulers, they did not necessarily result in the *suppression of their sovereignty* or remove them from the orbit of the natural family of nations" (underlining by this rapporteur). 70/

148. An important aspect of this question is reflected in the discriminatory clauses frequently imposed by the "Royal Companies" on the indigenous governing authorities in the treaties concluded between them, whereby they were prohibited from establishing trade relations with the companies' European competitors. In this connection, in a well-known case of international litigation decided in 1960 by the International Court of Justice 71/ (concerning the dispute between India and Portugal over a 1779 treaty between Portugal and the State of Maharata) the Court confirmed indigenous sovereignty in such a situation.

149. Another important aspect of the problem of indigenous treaties relates to the absence of an "indigenous version" of these instruments, or the fact that, if such a version exists, it is not deposited with the competent official agencies of the nation-State concerned in the appropriate historical archives, nor does it appear in the treaty series published by the non-indigenous academy. A further important aspect of this question of the definition of

what constitutes the "authentic text" of such treaties is the value to be given to the non-indigenous versions held by these agencies, archive departments or series, which are virtually always the versions to which reference is made when addressing these problems.

150. Assuming from the start that there does not exist any formal definition of "authentic text", a well-known specialist, Shabtai Rosenne, came to the conclusion - after a careful analysis of treaties concluded in different languages - that "for a text of a treaty to be 'authentic' in the legal sense, the first condition would be that it should have been adopted by the treaty-adopting body itself" [i.e., the bodies or parties concerned].

151. In other words, it is the acceptance of the same by all concluding parties of a given instrument which confers, on any version of its contents, the character of authentic text. He also reasserts, in this connection - although he is undoubtedly referring to cases of treaties between States - the need to seek, among all the possible versions of these multiple texts, "linguistic concordance to the extent possible, and juridical concordance in all cases". 72/ (underlining by present rapporteur). To extrapolate from this statement to cases involving treaties between States and indigenous nations does not seem excessively bold.

152. If this reasoning may also be applied - as the Special Rapporteur believes it can - to the latter, the question arises of the implications, from the historical angle, of recognizing the existence of a clearly defined indigenous political and juridical system, which differs in many respects from that of the non-indigenous counterpart to such instruments, at the same time accepting the existence of a non-European Law of Nations (in force in the other parts of the world where the recent arrivals conducted legal business with the indigenous nations) or the unrestricted application to those areas of the essential principles of the European Law of Nations, as it existed at a given period. In this regard, referring to the initial juridical relations established between sovereign parties in South-East Asia, Alexandrowicz underscores the need to "consider the position of [each sovereign party] against the background of local political organization and legal tradition". 73/

153. None of the issues referred to above is purely juridical and conceptual in nature, nor are the questions raised important only as a means of illustrating the complexity of the problems relating to indigenous treaties or the need to address them from an angle removed from Eurocentrism in order to understand them. All of them are particularly important, above all, as a means of understanding the scale of the destruction of sovereignty that was later to affect the indigenous peoples.

154. In his important study on European expansion overseas and international law, Fisch 74/ emphasizes that the starting point for European expansion in the fifteenth century was the nearly total absence of relations with extra-European peoples, a situation one could qualify as "negative equality". Once the initial contact had been established, a broad range of approaches could have been used to regulate relations, ranging from unilateralism to reciprocity. Between these two extremes it was possible to develop variants

such as equality and inequality both as regards the nature of the relations and the juridical instruments in which they were expressed.

155. According to the same author, from that point onwards there were two basic possibilities, namely: (i) the new relation is grounded on reciprocity/mutuality, meaning that the two subjects establish diplomatic relations with identical rights and obligations for both, these relations being confined to rights pertaining to the realm of external sovereignty; or (ii) one of the two subjects seeks to achieve a position of dominance by claiming rights without incurring obligations, or by usurping rights previously exercised by the other legal-political entity which is its counterpart.

156. Where European expansion in particular is concerned, the most common situation was the second of these possible variants, and its result was colonialism.

157. Nothing better illustrates what is at stake than the inherent contradiction in the reasoning behind the famous sentence handed down by the United States Supreme Court - in the words of its President, Judge Marshall - in the famous Worcester v. Georgia case of 1932. On the one hand, Marshall reasons as follows:

> "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." 75/

On the other hand, he advanced the thesis that the United States of America possessed rights over those very same nations, on the basis of their "discovery" by Great Britain, and by virtue as its status as political and territorial successor of the British.

158. According to Fisch, the main problem - from the angle of the new dominant Power - is to provide a justification for its acts of domination. This is of course from the purely juridical angle; for practical purposes, "might makes right".

159. In his view, in juridical terms, when entities that were previously ignorant of one another establish links for the first time they have no alternative but to adopt the principle of strict reciprocity, since this is the logical consequence or corollary of the "negative equality" already referred to. If in practice one party subsequently establishes its supremacy over the other, or seeks to achieve hegemony, it becomes necessary - for a variety of reasons - for it to seek legal justifications, in order, for example, to uphold claims against other contending parties or to counter domestic criticism (e.g. the case of the later scholastic philosophers).

160. In this context, Fisch distinguishes between circumstantial justifications and general ones. In the case of European overseas expansion, the latter played a crucial role. They had inherent universal applicability and included such well-known terms as "the right of conquest", "humanitarian (or civilizing) intervention", etc. Significantly, moreover, such justifications referred to rights that were specifically claimed by the European powers, such as the right to propagate the faith unhindered.

161. A further corollary of these initial mutual relations is mutual recognition. Fisch draws attention to the fact that in the case of European expansion, formally established juridical relations coexisted alongside claims to rights which they never succeeded in securing in practice or which could only be secured at a much later stage. Naturally, this negated the recognition previously extended, a situation that took extremely diverse forms (as will be seen later in this report).

162. Fisch makes another important distinction, i.e. the distinction between various types of international law in the relations established with the indigenous peoples. These are: (i) international overseas law; i.e. the body of law that emerged from the juridical relations established (principally through treaties) between the European powers and political entities overseas (indigenous peoples); (ii) international law relating to lands overseas, which only concerned relations between the European powers themselves and in which indigenous peoples figured as "third parties", and (iii) international law relating to overseas peoples, which is however little known except through works such as those of Alexandrowicz (already referred to) and the sources on which they are based. Of these three variants, clearly the most significant for the purposes of this study is the first.

163. According to Fisch, an essential feature of international law was the universal validity of the "Law of Nations", notwithstanding the verbiage that was (and is) occasionally employed regarding an alleged "watershed" separating the "rule of law" from a huge part of the world's territory living in a situation "of total lawlessness". In actual fact, the manifold and extremely diverse relations that developed within the framework of international law with the indigenous peoples from the very outset of European expansion cast doubt on that fiction.

164. In this respect, it should be mentioned that as far as the development within international law of doctrines concerning the juridical status of regions outside Europe is concerned, Asia played a less prominent role than other regions, such as the Americas (during the sixteenth to the eighteenth centuries) and Africa (in the nineteenth century). The main reason for this is that in Asia the European Powers encountered manifold difficulties in establishing themselves - particularly initially - as they were compelled to conform to a pre-existing system of international relations that was particularly alien to their traditions; the role and importance of that system were decisive factors in that part of the world (despite the impact thereon of the subsequent European presence).

165. Again, according to Fisch, the situation in Africa was similar to that in Asia during the sixteenth to the eighteenth centuries; later, however,

the situation in that region became more similar to that which obtained in English-speaking America during the nineteenth century.

166. From the above, Fisch concludes that it is not possible to reduce the international relations between the Europeans and indigenous peoples as a whole to a single pattern. For a long period - which of course includes the traditional colonial period following the early contacts - a number of variants of international law coexisted, and were employed by the Europeans depending on the various circumstances and their diverse interests. However, one element is clearly established in his study: those relations never existed within a legal vacuum. 76/

167. In other words, according to Fisch, both in theory and practice - and during the whole era of European expansion - international law was taken to be universal and its norms were considered to be applicable to the whole world. The bone of contention was determining who were subjects of such a universal system of norms. 77/

168. Two conflicting replies were offered to that question: (i) the Law of Nations was restricted to the European "actors" wherever they operated; this thesis was based on aspirations to European world hegemony and excluded from its scope any non-Christian or "uncivilized" political entity, and (ii) each of the independent political entities in the world would be declared a potential subject of that universal international law, and would only achieve full status as such when it established relations with the "authentic" subjects that already existed (hence the importance acquired by the so-called "theory of recognition" both in this discipline and in its diplomatic law branch). Obviously, in practice it was impossible for either of these two variants to establish itself. In reality a wide variety of situations obtained.

169. Fisch's study confirms - as does the subsequent work by Dörr - the Special Rapporteur's earlier observations 78/ concerning the situation in English-speaking North America and in particular in respect of the United States of America: the practice followed by States, as a source of customary international law, contradicts "conventional wisdom" which denies indigenous nations legal capacity as subjects of international law. Quite the contrary: from the very beginnings of that relationship, the indigenous nations were considered as capable of preserving peaceful or warlike relations and of entering into treaties with the European Powers. 79/

170. Finally, it should be emphasized that in Fisch's view the heart of the problem is that international law currently constitutes a system encompassing entities that are juridically equal, but which must at the same time face considerable de facto inequalities, which cannot be done away with merely by proclaiming equality. Consequently, he concludes that the international juridical order is compelled to take those inequalities into account and to guarantee minimum applicable standards to the parties in the weakest position (e.g. by granting them special rights). 80/

171. Following this presentation, it is necessary to analyse the various ways in which this process of diminution of the international legal status of indigenous peoples occurred, together with the means employed to bring it

about. The process took a great variety of external forms, ranging from pure and simple annexation of indigenous territory to forms of so-called "self-government". An extensive array of methods were also employed, ranging from simple armed force to treaties themselves.

172. For the purposes of this analysis, the different situations obtaining in various parts of the world will be taken into account, and in order to illustrate them consideration will be given to some of the cases selected in the first progress report, together with some others considered relevant on account of the progress made in the research work.

173. It is indispensable to reiterate once again that the examples that will be provided in this second progress report will not be the only ones that will have to be taken into account by the author in formulating his definitive conclusions in his final report on this study.

174. As indicated in the introduction, and for the reasons given there, this second report will be restricted to examining this process in a number of situations in the regions of Asia/Oceania and Africa. The evolution of situations in other regions will be analysed in a later report.

175. Where Asia/Oceania are concerned, the cases of the indigenous peoples in Aotearoa/New Zealand, Australia, Hawaii, Japan, present-day Polynesia under French administration and all aspects of the Panglong Agreement (relating to territories covered by present-day Myanmar) have been addressed by the Special Rapporteur in this report.

176. Regarding Aotearoa/New Zealand, in his first report 81/ the Special Rapporteur provided a number of basic historical references concerning certain significant features of the relations that developed between the Maori people and the European colonists who arrived in the islands from 1760 onwards. In this second report, attention will focus on an analysis of the current juridical status and situation of this indigenous people in the light of the Treaty of Waitangi (1840) and of various legislative measures affecting them, promulgated by the authorities of European origin (Pakeha (i.e. non-Maori) in New Zealand).

177. For obvious reasons, the succinct 1840 Treaty, entered into by Captain William Hobson - in his status as Consul, Lieutenant-Governor and Governor-Designate - in the name of the British Crown with representatives of apparently 500 Maori tribes is the key element in this analysis. Moreover, the Special Rapporteur has received scant documentation on this instrument from indigenous sources (nor has he received a reply from the Government of New Zealand to his questionnaire) and he has been compelled to base his judgement of the current situation on secondary sources. 82/

178. Noteworthy among these sources is a relatively recent analysis of the Treaty by Professor Ian Brownlie, 83/ which both the Special Rapporteur and his consultant believe to be of fundamental importance in this field, both in terms of its coverage and the logic of its judgements. Its importance resides in the fact that it sheds light on the gap between Maori and non-Maori positions in respect of this key document.

179. Several important features of the non-indigenous version of the Treaty should be emphasized from the outset. In the preamble, the Queen of England expresses "her desire to preserve their chieftainship and their lands to [the Chiefs and subtribes of New Zealand]", as well as her intention to establish "a government so that no evil will come to Maori and European living in a state of lawlessness". According to the same version, in virtue of article 1 of the Treaty, "the Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete Government over their land." (underlining by this rapporteur).

180. Article 2 reads as follows:

> "The Queen of England agrees to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent" (underlining by this rapporteur).

181. In article 3, the Queen undertook to "protect all the ordinary people of New Zealand and give them the same rights and duties of citizenship as the people of England." (underlining by this rapporteur).

182. Brownlie's analysis may be taken to reflect, to a large extent, non-indigenous views regarding the Maori population. For example, it adopts an approach - whose principal characteristic is its vagueness - according to which it would suffice to address the problems faced by Maoris today from the angle of human rights and social justice in order to provide a remedy. He expresses the view that the application of international human rights standards "should take care of most of the legitimate concerns of indigenous peoples".

183. In the same vein he claims - without offering supporting evidence - that the current commitments undertaken by New Zealand in this sphere under international instruments "much enhance" the provisions of the Treaty. This runs counter to, for example, the Maori representatives' definite interest in the adoption of the draft United Nations Declaration on the rights of indigenous peoples; that interest demonstrates that they do not consider the international instruments to be adequate as a possible way of solving their problems.

184. The significance of this approach goes beyond just ignoring the difference between "human rights" and "indigenous rights" (the latter category having a much more extensive conceptual and practical scope). The essential point is that it denies the relevance of the concept of "indigenous peoples" when dealing with the Maori issue. To this English jurist the importance that the Maoris give to that classification "smacks of nominalism and a sort of snobbery"; since in his opinion, a claim made in the name of "indigenous peoples" is "a claim not of equality but of privilege".

185. Following the same logic, the author adopts a position very similar to that of a former Canadian Prime Minister, Mrs. Kim Campbell, who would refer

to the indigenous peoples of Canada as "the first settlers". In dealing with the questions relating to the Treaty Brownlie takes the view that it is simply an attempt to treat equitably the various groups of people arriving successively in the same territory. He sees the Treaty as one of various ways of governing "intercommunal relations".

186. His ideas on the meaning and legal nature of the Treaty are particularly interesting, in view of the influence that he and hundreds of other well-known jurists have on shaping opinion in international forums and on the subsequent "scientific" works relating to subjects of this kind.

187. Although there is no doubt as to the validity of the Treaty, 84/ Brownlie feels a certain obligation to what he considers in effect to be the intrinsic paradox of this instrument. In his view "its execution meant that the separate international identity of the Confederation of Chiefs was extinguished and the procedure of implementation of the reciprocal promises was transferred from the plane of international law to the plane of internal public law" (underlining by this rapporteur). And he adds:

> "The Treaty of Waitangi does not fit into the normal pattern, that is, of external treaty obligations ... it is not binding upon the Crown as a valid international treaty: for New Zealand it is not a treaty in force. Its result was the disappearance of one of the international persons involved in the transaction. Consequently the Treaty does not have the same legal status in public international law terms as the recent international conventions concerning human rights. However, the internal relations of the Treaty are very similar to those of a currently valid international agreement. Its enforceability depends upon statutory recognition of the rights protected by its provisions." (underlining by this rapporteur.) 85/

188. It has been said that the public-law principles which apply to the common-law system are based on the presumption that, for all internal purposes, treaties are not binding upon the Crown unless they have been recognized in supplementary legislative provisions. In accordance with the principle of "the supremacy of Parliament", the Treaty is only enforceable in the framework of the New Zealand legal system through the adoption of legislative measures.

189. This raises two major questions for the Special Rapporteur, namely: what is the scope of New Zealand's parliamentary sovereignty as far as the Treaty is concerned; and, on what basis is it generally considered in New Zealand that the Treaty of Waitangi is binding on the Crown - although not as an international treaty - through New Zealand as an intermediary but not directly when the Crown is represented by the United Kingdom?

190. The answer probably lies in an in-depth study of the provisions of various pieces of legislation 86/ which it has not yet been possible to undertake. However, whatever the case may be, it would appear that there has been absolutely no Maori participation in this legislative process.

191. It should be recalled that most of the non-indigenous New Zealand population interprets the Treaty as proof of acceptance by the Maori of the

annexation and the subsequent settlement of white colonists, and believes that the settlement took place perfectly legitimately, in accordance with the Treaty's provisions. Likewise, another author 87/ maintains that the Treaty of Waitangi can be compared to other treaties concluded between England - and also the United States of America - and indigenous peoples in other places, whose main aim was to ensure external sovereignty, leaving internal sovereignty in the hands of the aboriginals. However, he states that in the case of the Maori, at a stroke the English secured for themselves both internal and external sovereignty (in particular, by way of the clause granting the Maori English citizenship).

192. Another important question relates to the determination of which version of the Treaty is the authentic one. It is true that the New Zealand Parliament has acknowledged one particular version as being authentic, 88/ but this selection does not appear to have taken into consideration the versions of the text put forward by the Maori, such as those compiled in certain secondary sources and, more particularly, those explicitly described to the Working Group by the Maori representatives. Moreover, the Special Rapporteur has found no proof whatsoever that the Maori have accepted the authenticity of the document which the Pakeha Parliament has designated as "authentic".

193. This document played a key role in the process of dispossessing the Maori people of its native land as perpetrated by the non-indigenous Parliament - a process which occurred in many other multi-ethnic/multiracial States. It was influential not only in the institution of the substantive legislation used to regulate the possession of land in accordance with norms based on Euro-centric concepts of relationships with the land, but also in the setting up of judicial machinery empowered to settle the legal disputes inevitable arising from the dispossession process.

194. From the time of the Treaty, pre-emption or purchase by the Crown as a means of "legal acquisition" of land prevailed in Aotearoa/New Zealand. In 1862 and 1865 two laws were passed in this connection, the latter being called the Native Land Rights Act. An important part of this process was the Maori Issues Act of 1953.

195. The 1865 Act set up the Maori Land Court which was mandated to define Maori property rights in relation to the land traditionally occupied by Maori, and to take decisions on the subject, and also to convert their title to that land as established under their rules and customs to a title in line with the rules of English law, and to clarify the position of the Crown on all questions pertaining to its right to occupy land.

196. According to the information so far made available to the Special Rapporteur, there are currently two principal forms of land tenure in New Zealand that apply to the autochthonous population, namely:

(i) land that belongs to the Crown under common law but is occupied by the Maori in keeping with the customs and practices of any of their tribes (Part XIV of the 1953 Maori Issues Act as amended - the primary purpose of which is to affirm the Crown's higher title to that land). In general, there is now little or no land held under this title. Title has been recognized on the grounds of "discovery", ancestry (pupuna), conquest/confiscation (raupatu) and gift (tuku); and

(ii) Freehold land once owned by Maori in fee simple, whether legal or equitable;

all of which lies under the exclusive jurisdiction of the Maori Land Court.

197. The Court has played a key role in converting land owned collectively by Maori under the first form of ownership into freehold land owned in fee simple (as individual owners), making it possible for such property to be purchased by non-indigenous persons. In his study on Maori land tenure Kawharu 89/ describes how this process destroyed the system of collective tribal ownership.

198. Another of the major problems caused by this system appears to have been the excessive fragmentation of Maori land. It is estimated that the Maori currently only hold approximately 2 per cent of the national territory.

199. The creation in 1978 of the Waitangi Tribunal brought with it the hope that corrections would be made to the original system, centred essentially on the Maori Land Court. Before any conclusions can be drawn in this area, it will be necessary to await some of its decisions on more important cases, such as that relating to the Maori claims challenging the confiscation of vast tracts of land in the North Island - on the basis of the New Zealand Settlement Act of 1863 - which took place following some Maori uprisings. There are currently over 400 Maori claims waiting for decision by this body. By the end of 1994, the Tribunal had only handed down decisions on approximately five of them. 90/

200. Mention should also be made of the repercussions on traditional Maori institutions not only of the provisions of the treaty relating to citizenship (the Native Land Rights Act (1865) and the Citizenship Act (1977) are also relevant here), but also of other legislative measures regulating, among other things, such major issues as marriage, adoption and inheritance. For example, marriages celebrated in accordance with Maori tradition since April 1952 have been declared invalid.

201. Lastly, a recent positive development should be underlined.
On 21 December 1994 the Waikato Maori nation and the Government of New Zealand reached an agreement on a land dispute dating back 130 years. The agreement - achieved through the intermediary of the Waitangi Tribunal - recognizes the indigenous party's right to control some 14,000 hectares of land and grants compensation equivalent to US$ 109 million. 91/

202. Turning to Australia, the information made available by the Australian Government in its reply to the Special Rapporteur's questionnaire and the documentation provided by the Aboriginal and Torres Strait Islander Commission of Australia, have been particularly useful.

203. According to some estimates, between 500,000 and 1,000,000 people were living on this island continent (measuring over 7.5 million km^2), in 1788, when the British claimed sovereignty over New South Wales (at that time the whole of eastern Australia) and the right to ownership of all the land in that

territory (approximately 1.5 million square miles). At a stroke, several hundred thousand human beings - living in hundreds of communities which the newcomers called tribes - were dispossessed.

204. Until fairly recently non-indigenous conventional wisdom considered that this had been possible because of Captain Cook's "discovery" of Australia. But neither this assertion, nor the claim that the territory was terra nullius, were in fact defensible because the land had long been occupied by the indigenous population and its ancestors, and that population had a very advanced system of tenure of land and exploitation of that vital resource. In an attempt to uphold a claim considered by many to be somewhat extravagant, the colony's authorities emphatically declared that Australia has been virtually uninhabited when the first non-indigenous persons arrived (had literally been terra nullius).

205. This fiction, whose origins can be traced back to the observations made by a handful of members of Cook's expedition (who, moreover, never set foot on dry land), was perpetuated for over two centuries in Australia's official political and legal history.

206. In his leading work, Reynolds 92/ succinctly explains the background and subsequent development of this monumental myth as follows:

> "The theory of an uninhabited continent was just too convenient to surrender lightly. Consequently the gap between law and reality, law and colonial experience grew progressively wider. The law retreated farther from the real world and farther into injustice as the nineteenth century progressed. In 1819 the Crown Law Officers determined that New South Wales had been taken possession of as 'desert and uninhabitable'; the *South Australian Constitution Act* (1834) referred to the land of the colony as being 'waste and unoccupied'. In a judgement in 1849 the Chief Justice of New South Wales referred to the 'circumstances of newly discovered and unpeopled territories'. Forty years later the Privy Council lent its great authority to the mythology. In the case of *Cooper v. Stuart* it was determined that Australia in 1788 had consisted of a 'tract of territory practically unoccupied without settled inhabitants'. That view would have been difficult to sustain in 1789, let alone in 1889. But such are the ways of the law that *Cooper v. Stuart* was considered as the leading case, binding on Australian courts, and was deemed to be so by Justice Blackburn in the so-called Gove Land Rights case in 1971. In *Coe v. the Commonwealth* in 1975 Justice Murphy concluded that it was not binding on the High Court but the doctrine of *terra nullius* was not finally overturned until the Mabo decision in the High Court in June 1992." 93/

207. In the 1830s and 1840s, when it was becoming increasingly clear that Australia was divided into well-defined tribal territories and that its indigenous peoples - both the continent's aboriginals, and the peoples of the offshore islands - i.e. the Tasmanians and the Torres Strait Islanders - were putting up strong resistance to the Europeans intruding on their lands, the question of how the British had taken possession of the continent began to be a cause for concern to many of the settlers.

208. A number of explanations were given. One was the "right of conquest"; but although this theory could have explained how the British had gained sovereignty over the continent, it did not justify the total dispossession of the original inhabitants, since according to legal doctrine at that time (e.g. Vattel) conquest implied taking possession of the property of the conquered State, but not of that of its individual inhabitants.

209. The legal experts looked for another justification, and found that of prescription of rights. However, as far as Australia was concerned the second of the requirements necessary for its application was not met; for not only is it necessary to have exercised the right in question for a certain period, but there also has to be general acquiescence of the other party to the right. However, the indigenous inhabitants had never ceased to resist the settlers' aspirations to their land.

210. A further justification was the Europeans' supposed greater ability to exploit the land.

211. There was another disturbing legal question however, whatever "legal justifications" might be sought to support the legitimacy of sovereignty and the European colonizers' actual taking of possession of Australia. Assuming that both points could be justified, then the law in force in England (common law) applied to the island continent.

212. If that was the case, how could it be reasonably argued that that law did not protect sacrosanct private property, in this instance the property belonging to the indigenous population? Why were they not granted fair compensation for the land that had been snatched from them? The Crown's acquisition of aboriginal land on the premise of its eminent domain over that land required, under common law, both the acquiescence of the aboriginals, and the payment of compensation for the losses suffered. Neither requirement had been met in Australia, and the subjects had not even been worthy of serious discussion in those early days (although there were some exceptions - involving attempts to purchase aboriginal land - that only served to confirm the general tendency to ignore these issues in practice).

213. Rivalry over the ownership of land and indigenous resistance to expanding colonization to a large extent shaped relations between Whites and "Blacks" in Australian colonial society during the first half of the nineteenth century. This gave rise to the first Australian movement for the defence of indigenous land rights in the 1830s and 1840s.

214. This movement - which obviously was stronger in the mother country than in the colony - had been a product of the anti-slavery movement which had achieved a huge victory with the abolition of slavery in England in 1833, took concrete form with the founding, in approximately 1840, of the Society for the protection of foreign aboriginals. However, as Reynolds himself points out, the leaders of the anti-slavery movement who became involved in the situation of indigenous peoples, were faced with a considerable paradox:

> "The reformers were not against colonization. Far from it. They believed that Europeans had a duty to carry Christianity and civilization into the far corners of the world. But the fundamental problem was land;

> the refusal to recognize indigenous property rights was the original sin which coloured every later development. When their land was taken without consent or compensation the natives were certain, indeed duty bound, to resist. The settlers would, with equal certainty, put down the resistance with a strong hand. The experience would brutalize them; they would become guilty, aggressive, in danger of damnation. The Aborigines would, for their part, remain sullen and resentful." 94/

215. For a short time the reformers had some influence on the British Foreign Office, which in the mid-1830s implemented some measures to improve the fate of aboriginals, although without much success in the colony. Other attempts were made by means of the South Australia Constitution Act, but in the version that was finally adopted the fiction of the "uninhabited continent" was upheld and proposals relating to possible compensation to be paid to the indigenous population for their loss of land disappeared from the Act.

216. In the period 1838-1840 three "imperial laws" were promulgated which provided some support for indigenous land rights. They made provision for the setting up of indigenous reserves, recognized the right of the indigenous population to use or occupy Crown land, and provided compensation to finance their education and well-being.

217. The indigenous reserves were set up in previously colonized districts from the second half of the nineteenth century onwards; but unlike the criteria governing similar reserves in the United States of America (tacit recognition of the right of indigenous people to the land that was "reserved" for their use), in Australia the reserves were not interpreted as an indication of any form of recognition of indigenous rights, and there was no sense of obligation incurred by the Europeans vis-à-vis the indigenous population. It was merely considered as a gesture of goodwill by the colony towards the continent's original owners.

218. In as yet uncolonized districts the Australian Waste Land Act (1848) was applied. This Act granted usufructuary rights to the aboriginals, who could continue to hunt, fish, gather and reside on land that had not yet been cultivated or fenced. In addition, it made provision for the continuation of the customary indigenous rights over the land leased to herdsmen.

219. Mention should also be made of the provisions of the Imperial Crown Land Sale Act (1842), which gave discretionary powers to the Crown to use resources gained through the sale of land. In practice it was decided to use part of this money for aboriginal schools.

220. The responsibility of the imperial authorities for aboriginal affairs ended in 1846, except in the territory of Western Australia. Self-government began in Australia in 1856 when the island continent was divided into a number of states and territories.

221. Following such a substantial change in the colony's political situation, the provisions made in the "imperial acts" mentioned above did not prosper. The reform movement disintegrated. The common-law system (in contrast to statute law) continued to be used to ratify the expropriation of indigenous land without any considerations of negotiation or compensation.

222. Reynolds raises an extremely important legal question. 95/ Would the fact that the European settlers were unaware of indigenous land rights mean that those rights were extinguished? The courts of the United States of America - basing themselves on similar legal principles - have repeatedly stated that the "aboriginal title" to land (i.e. a right based on the principle of occupation and ownership of the territory concerned) does not depend on its express recognition under a legislative provision enacted by the non-indigenous power, noting that the title can only be extinguished through specific action by the federal Government (an equivalent situation to the customary rights recognized by common law which can only be extinguished through an act of Parliament).

223. Consequently one may ask: were the rights to occupy or to use the land granted to them by the British imperial Government (for example under the Australian Waste Land Act of 1848) extinguished at any time? And if the answer is in the affirmative - and now it is the Special Rapporteur who is asking the question - what proceeding brought about that extinction? If, on the other hand, they were not extinguished the "indigenous title", Reynolds concludes, and his legal logic appears flawless - remains in force in all matters pertaining to the Crown lands, which, in fact, still include over half of Australia.

224. During the first half of the twentieth century non-indigenous Australia apparently erased the issue of indigenous land rights from the country's history; the question disappeared from the political agenda between 1880 and 1950. But the problem of the extinction of the "indigenous title" arose once again in spite of repeated efforts to avoid dealing with it on the basis of the fiction that Australia had not been populated when it was "discovered". The question remained however that if that were the case, how were the rights of the people who were inhabiting it in 1788, (a fact that was known to be true) extinguished?

225. The original indigenous ownership of the land has since been the big unresolved question in Australia and has resulted in repeated indigenous demands for the non-indigenous power to sign a Makarrata (treaty) with the autochthonous peoples formally to recognize this original title. To the best of the Special Rapporteur's knowledge the Australian Government has not ruled out this possibility, and in 1988 the Australian authorities declared their intention to negotiate with the aboriginal peoples as part of a "reconciliation process" in recognition of the unjust acts that their forebears had committed against the aboriginal peoples. 96/

226. The problem lies in the fact that in Australia, as a general rule, sovereignty and ownership have been thought inseparable. Those who have fought against the recognition of the indigenous peoples' original rights to their land maintain that the recognition of those rights would signify the establishment of a nation within a nation.

227. As mentioned above (the quotation by Reynolds in para. 206), an investigation of legal cases relating to this subject demonstrates that the Gove and Mabo cases constitute the two extremes of the trajectory travelled by the issue in Australian jurisprudence.

228. In the first of those cases, Mr. Justice Blackburn stated that the defendants - who maintained that they had held dominion over the disputed lands since time immemorial - did not own those lands; concluding that all the rights and titles to the land were necessarily a direct consequence of some type of concession handed down by the Crown and that if the Aboriginals could not produce a concession of that sort, then they had no valid title of ownership, let alone a "native title" to that land.

229. For this reason, it is easy to see why the Mabo v. Queensland case (1992) 97/ brought about such a dramatic change in the ongoing debate concerning the legal status and the situation of Australia's autochthonous population. However, the reactions to this decision, both by the general public and by the central and state Governments, demonstrate how far Australia still has to go before the question of land rights is finally resolved.

230. The High Court declared that the concept of terra nullius was a totally inappropriate foundation for the Australian legal system. It found that the ease of acceptance of that doctrine was due to the confusion which had existed between sovereignty and ownership. Lastly, it recognized that the dispossession of the indigenous population had occurred little by little over a long period of time. But it refrained from defining how and when that spoliation had occurred.

231. Furthermore, the decision established that the Australian Aboriginals have the right to their traditional lands - but only where those lands have not been appropriated by the federal or state Governments and only if the indigenous population has maintained continuous links with it in keeping with its traditions (which has not happened in many cases).

232. Mrs. Lois O'Donoghue told the Working Group in 1993 that "Important though the decision is legally and politically it is essentially conservative and restrictive". Mr. Paul Coe, representing NAILSS (an indigenous NGO), went further: "the decision merely serves to replace the legal fiction that Britain legitimately settled territories belonging to no one, with the less obviously offensive legal fiction that Britain legitimately settled territories that [were] already inhabited by indigenous peoples". 98/

233. Just a year after this momentous and controversial decision, both houses of the Australian Federal Parliament approved the Native Title Act of 21 December 1993. The Act codifies by statute the historic legal rejection of the doctrine of terra nullius. However, many are of the opinion in Australia that the crux of the new Act is the fact that under its provisions, to be able to claim title to land or obtain compensation for the loss of land, the Aboriginals and Torres Strait Islanders must show a long-standing connection with the land (whatever that expression might mean). In addition, only claims relating to Crown lands are admissible. This in turn has been a cause of concern for the country's major mining companies, which are now forced to negotiate with the indigenous population about issues such as the period of validity of their concessions and the scope of their rights under those concessions.

234. It is still too soon to evaluate the practical repercussions of Mabo with any certainty. This will have to be done following consideration not only of

the discussion document drawn up by the Australian Government to commemorate the first anniversary of the decision, but also of the Council for Aboriginal Reconciliation Act (1991) and the Racial Discrimination Act (1975). In Nettheim's view 99/ the latter Act is particularly important in this analysis.

235. The multiplicity and diversity of regulations governing land rights and land tenure in force in the various states and territories into which Australia is divided politically further complicate any assessment to be undertaken.

236. Lastly, any evaluation of the situation of the Australian autochthonous population at the beginning of the 1990s must take into account the level of national concern that led to the setting up of a Royal Commission to investigate Aboriginal deaths in custody.

237. In its final report (1991) the Commission concluded that "system failures or absence of due care" had contributed to the many deaths that had occurred. According to the Commission, racism and racial prejudices against the indigenous population had been detected in the institutions in which the deaths had taken place.

238. The case of Hawaii differs considerably from those of the other peoples of the area. It should be recalled that quite some time before the process of erosion of its sovereignty began, a modern nation-State had been founded on the territory of these islands; it was organized in the form of a monarchy, had obtained formal diplomatic recognition and had concluded treaties with a wide variety of European and other Powers during the nineteenth century, including the Swiss Confederation, the United States, France and Russia.

239. The process of erosion began in the third decade of the nineteenth century with the arrival on the islands, in approximately 1820, of the first groups of missionaries from the United States (Congregationalists from New England) and culminated with the incorporation of Hawaii into the United States as the fiftieth State of the Union in 1959 (during the administration of President Dwight Eisenhower), following on from the annexation of its territory by the United States in 1893, at the end of President Benjamin Harrison's Administration.

240. According to the testimony given by the last sovereign of that State, Queen Liliuokalani, 100/ the rulers at that time accepted the newcomers as advisers, not only in religious matters, but also in such varied areas as public administration, agriculture, public health and commerce.

241. The arrival in the Kingdom, in subsequent years, of other groups of immigrants from outside the region (mainly from the United States) complicated the country's political situation because of their growing economic influence in the islands. This economic authority had its political counterpart, and by the beginning of the 1890s some of these immigrants had attained positions as cabinet ministers in Hawaii. They went on to pave the way for significant reforms to the country's successive Constitutions that had considerably reduced the powers of the various monarchs who preceded Liliuokalani.

242. According to her, those individuals ("children of missionaries and persons with connections to families linked to the United States Diplomatic Mission in Hawaii") constantly promoted annexation to the United States. In her account she states that the situation deteriorated in 1892 and that when she - in her quality of reigning sovereign and as heir apparent since 1877 - was preparing the promulgation of a new Constitution more in tune with Hawaiian tradition and was strengthening her powers as Head of State, those "Americans or 'quasi-Hawaiians'" instigated a coup d'état against her Government and invited her to abdicate, establishing de facto a "provisional Government" to replace the legally instituted one.

243. She maintains that the head of the United States Mission, Dr. Stevens, was not unconnected with this coup d'état and underlines what we already know from the history books: the American troops - disembarked from the warship "Boston" - supported the coup d'état, and participated in consolidating the so-called "provisional Government", in promoting a formal treaty "legalizing" the annexation and, of course, abolishing the autochthonous sovereignty.

244. On 17 January 1893, the sovereign protested against the "treaty", describing it as "an invasion of the rights of the ruling Chiefs in violation of the international rights of my people, and of the friendly nations with which we have concluded treaties", adding that her people "had not been consulted [about the treaty of annexation] ... [that] ignores not only the civic rights of my people, but also the hereditary ownership of its Chiefs ...". 101/

245. In her declaration, the Queen - who could be considered to be a rather radical personality - wondered: "whether the American Republic of States [i.e. United States of America] is moving towards degeneration and is on the way to becoming a pillager of other people's lands." She adds: "there is little doubt that the United States of America can successfully rival the European nations in the race for conquest ... and that it can establish a vast military and naval power if that is its ambition. But is such an ambition laudable? Is such a deviation from its established principles patriotic or political?" 102/

246. In July 1991 the Ka Pakaukau, a coalition of kanaka maoli (indigenous Hawaiian) organizations, submitted to the Special Rapporteur its reply to the two questionnaires he had prepared for consideration both by States and by indigenous organizations and peoples. The Ka Pakaukau replied to the questionnaire intended for governments, given its close ties to "the sovereign nation of Hawaii". As already mentioned, there has been no reply from the Government of the United States to this questionnaire.

247. It is clear that since the annexation of Hawaii, the authority to conclude treaties in respect of the Hawaiian territory is in the hands of the United States. The Ka Pakaukau's reply to the indigenous questionnaire clearly states that the indigenous population of Hawaii does not feel bound by any treaty that may have been imposed upon it by the United States and emphasizes that no treaties or any other joint agreements have been concluded between the United States and the indigenous population of Hawaii.

248. Lastly, it should be pointed out that from 12 to 21 August 1993 a meeting was held in Hawaii (Ka Pae' eina, i.e. Hawaiian archipelago in the indigenous language) - a non-governmental "International Tribunal of Peoples" - whose aim was to try the "United States of America for injustices committed against the Kanaka Maoli nation and people". The charges included inadmissible interference in the internal affairs of a sovereign people and nation, aid to and complicity in a foreign coup d'état, the annexation of a sovereign people and its territory without its consent, the illegal appropriation of its lands, waters and other natural resources, acts of genocide and destruction of the environment.

249. One of the tribunal's recommendations is that "the United States and the world should recognize the inherent sovereignty and right to self-determination" of this people and "the right to decolonization under General Assembly resolution No. 1514 (XV)", as well as that people's right to recover "without delay" the lands belonging to it, including the "restoration of its rights to its waters". 103/

250. With regard to the present-day territory of Japan - although the observations which follow are also valid for certain territories currently under the jurisdiction of the Russian Federation - the situation of the Ainu people has deserved the attention of the Special Rapporteur, who decided to include them in his first report in the list of situations considered to be relevant to his terms of reference. 104/

251. The Ainu people are the original population of the island of Hokkaido (the northernmost of those making up the Japanese archipelago), as well as the original population of the southern coasts of other neighbouring islands (such as Sakhalin-Karfuto 105/ and the Kurile islands - Chichima) which either belonged to Japan before the Second World War, or were claimed by it as its property before the war, but remained under the jurisdiction of the now defunct USSR as a result of the Japanese defeat in that war.

252. Unfortunately, neither the Government of Japan nor that of the Russian Federation has replied to the Special Rapporteur's questionnaire; furthermore, neither has he received detailed information from the Ainu on the situations they face. He has therefore been obliged to use the meagre supply of secondary literature to which he has had access in this case.

253. According to these sources, it was only during the second half of the nineteenth century that a clear process of settlement-based colonization began on the Japanese island of Hokkaido. Up to that time the island was the ancestral territory of the Ainu, a people of Palaeo-Siberian origin, whose traditional style of life was (and still is) based on hunting and fishing.

254. The Ainu people represent only a very small proportion of the current total population of Japan (about 120 million). According to the information obtained, the total number of Ainu people is currently estimated at around only 100,000 individuals.

255. Both in terms of the differences between its specific national characteristics - relative to its origins as a people, and also its culture and traditional means of existence - and those of the newcomers in its

territories, and also in terms of the process of its subsequent relations with these people (a colonization process with features quite similar to the European-style process of the time), and the type of relations established between the Ainu and those newcomers on the basis of original contacts, this people is one of those which in Asia/Oceania have strong indigenous characteristics both in the current sense dictated by this study and also in accordance with the criteria contained in the "working definition" of Martínez Cobo (see chapter II above).

256. According to the information available, the main problem faced by this people has been - and continues to be - the assimilationist policy applied to it from the beginning by successive Japanese authorities.

257. Efforts of this kind were particularly intense during the Meiji period of Japanese history (1868-1918), an era from which dates the so-called "Hokkaido Former Aborigines Protection Act" of 1899. From that time official policy towards them was designed to prohibit the public use of their language, as well as other important manifestations of their culture.

258. Certain aspects of the policy to integrate them into national life have continued uninterrupted up to the present day, on the basis of the so-called "ethnic unity" of the country. 106/

259. However, it must be pointed out that over a relatively short space of time Japanese policy towards this people seems to have undergone a certain change which - although in a somewhat vague manner - may be considered as being directed towards recognizing the specific nature of the Ainu people, although not as an indigenous people, but as an ethnic minority.

260. Such a classification is not accepted by the Ainu people, who are currently seeking their international recognition as an indigenous people. Their efforts within Japan are currently centred on achieving the abolition of the 1899 Act and replacing it with a different law which recognizes their national identity.

261. The Special Rapporteur's opinion coincides with the views of those who, like Takemasa, consider that the terminology used by the Japanese authorities in its 1991 report to the Human Rights Committee 107/ in relation to the Ainu people is interesting and worthy of further analysis. In that report, in references to the Ainu people, the term shozu-minzoku (literally "a people few in number") was used rather than the term reserved for "minorities" (shozusha). 108/

262. Such terminology has led Takemasa to formulate various important questions; in particular whether, since the term shozu-minzoku is used, the Ainu are being recognized as a "people" within the meaning of international law (under the Special Rapporteur's criterion, the answer is an unqualified "no").

263. Two further questions raised by the above author (to which, in contrast, he does not expect a precise answer) relate to when and on what basis the Japanese Government began to consider the Ainu people, who from ancient times

had lived under their own institutions, as an "ethnic minority", and also to when and how the Government claimed that Hokkaido and the "Northern Territory" became Japan's "original territory". 109/

264. The above is based on the official position, which states that members of the Ainu people are "Japanese nationals by origin" and that the island is classified in accordance with what was stated in the previous paragraph. According to the author himself, 110/ so as not to contradict these statements, the Japanese authorities formulate their criteria relating to the Ainu people with great care, when they state for example that "in the Government's opinion it is an accepted theory, based on literature and other documents, that the Ainu people have lived since antiquity on the so-called Island of Hokkaido".

265. With regard to the territories currently under French sovereignty in Polynesia, at the beginning of 1995 the Special Rapporteur received from an indigenous organization a detailed report concerning the history and current situation - the latter as seen by that organization - of these territories.

266. The comprehensive documentation received included both a historical synopsis of the origins (in particular from the middle of the nineteenth century onwards) of the military, economic and political presence of France in this region of the world, and also a varied range of transcripts of historical documents relating to the gradual acquisition by that Power of its colonial assets in the area from 1838 onwards. This fits into the framework of the competition for colonies which was developed in the area by various imperial Powers of that era.

267. This historical process (which laid the ultimate foundations on which France now exercises its authority over these territories) drew to a close in 1901, having passed through a period of simple demonstration of armed force and continued with ultimatums and the proclamation of the protectorate before annexation was finally achieved.

268. It is well known that such facts did in their time generate definite opposition - clearly unsuccessful owing to the unequal balance of military power between the parties - on the part of the native population, part of which has maintained, even up to the present day, its rejection not only of such historical facts, but also of the current political situation. It has even claimed its right to decolonization and the full exercise of its self-determination and independence, in the spirit of United Nations General Assembly resolution 1514 (XV).

269. The accompanying documentation includes, inter alia, the following items:

(a) Ultimatum issued in the bay of Papeete on 30 August 1836, sent from on board the frigate "Venus" by Captain Dupetit-Thouars of the French navy and addressed to Queen Pomare IV, sovereign of Tahiti, demanding compensation as a result of events relating to two Catholic missionaries apparently expelled from the island;

(b) The Convention on Peace and Friendship of 4 September of the same year drawn up by Captain Dupetit-Thouars and Queen Pomare IV;

(c) The instructions sent on 15 October 1841 to the same official (by then a Rear-Admiral) by the French Naval and Colonies Minister regarding the seizure of the Marquesas Islands;

(d) Various laws regarding the seizure of various islands in the region by France;

(e) Proclamation of 9 September 1842 announcing the establishment of a Provisional Government in Tahiti (of which the French Consul on the island formed part);

(f) Instructions sent by the French Naval and Colonies Minister to Captain Bruat, appointed Governor of the Marquesas Islands (28 April 1843);

(g) Instructions sent by the Minister to Captain Bruat, also then invested as Commissioner of the King of France to the Queen of the Society Islands (dated 16 July 1844);

(h) Convention of 5 August 1847 between France and Queen Pomare, regulating the exercise of the Protectorate;

(i) Declaration of King Pomare V (25 July 1880) ratifying the union with (or annexation by) France of the Society Islands and its dependencies;

(j) Territorial Statute of French Polynesia (French Act No. 77-772 of 12 July 1977); and

(k) Territorial Statute of French Polynesia (French Act No. 84-320 of 6 September 1984).

270. For reasons of time, the Special Rapporteur has been unable to carry out a detailed study of such a large amount of documentation; this will be studied in due course. Even so, it is clear to the Special Rapporteur that the inhabitants of these territories (including the island of Mururoa) have the character of indigenous peoples.

271. Finally, it is worth adding that the Special Rapporteur has not received a reply from the Government of France to the questionnaire sent to its authorities in 1991 and 1992, relating to this study.

272. In his first report (para. 336) the Special Rapporteur selected the Panglong Agreement of 12 February 1947 as a possible case of "agreements between States and other bodies and indigenous peoples".

273. In Asia the case of Myanmar (formerly Burma) is easily distinguishable from the other situations in the region covered by this particular report. This State offers a highly illustrative example of the dilemmas which many new African and Asian States have been forced to confront in achieving their political independence after the end of the Second World War, the results of which accelerated the gradual breakdown of the traditional European colonial system which had already begun in the inter-War period.

274. Those dilemmas clearly relate to finding the best possible way of achieving the necessary internal political unity considered essential not only for resolving important domestic problems - both political problems and those relating to economic underdevelopment - inherited from the colonial authority, but in addition, to be able to maintain an effective presence in the international arena. Such a thankless task must have been undertaken, within a multi-ethnic framework, in the vast majority of the countries of the so-called Third World, such as Burma at that time.

275. The agreement referred to was signed in the city of the same name by representatives of the Shan, Chin and Kachin nationalities and by Aung San on behalf of the Burmese Government. It provides that the above peoples would enjoy semi-autonomous status within the Union of Burma. 111/

276. It is appropriate to recall that since ancient times the territories which in 1947 formed part of the Union had been inhabited by very diverse indigenous peoples 112/ and that these peoples had witnessed numerous attempts at political unification long before the Panglong Agreement was formalized.

277. The first contacts with Europeans date back to the sixteenth century; however, such contacts were only sporadic until the second half of the seventeenth century. As far back as the eighteenth century both the British East India Company and the British Government began to take an interest in these territories from both a strategic as well as a commercial point of view.

278. It is worth emphasizing that colonial competition between France and Britain in relation to India had repercussions in what is now Myanmar. Whereas the French supported the Mons people, the British meanwhile allied themselves with the peoples inhabiting the northern plains, who included the Burmese properly speaking. Their monarch, Alaungpaya, reigned until Britain annexed the colony in 1885-86. This process which led to annexation was preceded by a long period of Anglo-Burmese wars (1824-26, 1858 and 1883).

279. During the period 1889-1937 Burma was a province of the Indian Empire under British control. The Government of His Majesty kept it under joint administration with India until independence in 1948.

280. The British colonial administration in Burma was based on a massive wave of immigration from India, rather than on alliances with local elites. In contrast to what had happened in other parts of its huge colonial empire, in Burma the British tended to apply direct colonial rule. Indirect administration prevailed only in outlying areas; in particular, in the territories belonging to the Shans. The British sent military expeditions to fight against the so-called "hill tribes", but both the Chins and the Kachins put up resistance for decades.

281. In the case of the Karenni a special solution was achieved; according to Roland Bless, Great Britain and Burma concluded "a treaty" in 1875 which established that the State of Western Karenni would remain as a separate or independent entity and that no sovereignty or governmental authority over it would be demanded or exercised. 113/ Consequently, according to this author, the Karenni maintained "a quasi-independent" legal status "outside the

colonial administrative structure". They managed to safeguard their privileged status after the British separated Burma from India, since they were placed under the direct authority of the Crown, represented by the British Governor.

282. In 1937, under pressure from Burmese nationalists (many of whom were Buddhists), the British were forced to separate Burma from India and to grant it a certain degree of autonomy. The Burmese considered this to be insufficient and welcomed the Japanese invaders in 1942 as liberators from British colonial authority. This impression lasted for only a short time and soon gave rise to the anti-Japanese resistance movement led by the Anti-Fascist Peoples' Freedom League (known by its English acronym AFPFL), which supported the Allies' offensive, a general strike was launched in 1945.

283. In 1947 independence agreements were signed with the United Kingdom. Independence was formally declared on 12 January 1948 (i.e. less than one year after the conclusion of the Panglong Agreement). During the months between the two events, Aung San, the architect of Burmese independence, was assassinated together with six of his closest political allies.

284. It must be emphasized that from the very beginning of its existence as an independent State Burma faced the threat of the fragmentation of its territorial unity and the danger of its disintegration as a political entity, since the legal status of its so-called "Frontier Areas" could not be clearly determined. In this respect, it must not be forgotten that at the time, these areas - as defined in the 1935 Constitution - represented almost half the total area of the State, and their population (about 2.5 million people) constituted 16 per cent of the total population of the country. 114/

285. In general terms, the significance of the agreement has been analysed from various points of view. Some authors, such as R.H. Taylor, 115/ emphasize the fact that the British ordered, as a condition of independence, that the minorities constituting the "hill tribes" should unite with the Burmese in the new State and that thus the ethnic element would become an integral element in the process leading to the establishment of Burma as an independent political entity.

286. Others, including Leach, 116/ endeavour to shed light - with a historical and ethno-historical focus - on the true role at that time of the ethnic factor in the region; under that approach they draw attention to the different situations faced by the various "hill tribes". Whereas the Shans, the Kachins and the Chins were able to find a basis for agreement with the Burmese in Panglong, the Karens, the Karenni and the Arakanes opted to defend their non-integration with the new State; each of the two groups had their own reasons for acting as they did.

287. It must be mentioned that one of the inherent inadequacies of the Agreement is that it was only approved by three of these "tribes", whereas the rest (including the Karens, the most numerous of all the tribes) neither accepted it nor participated in negotiations on it.

288. The spirit of goodwill, and the desire to arrive at a possible basis for national unity, generated by the Agreement (despite the inadequacies

mentioned) did not stand up to the test of time or long survive the death of Aung San. The plebiscite planned in the text of the Agreement for 1958 was not eventually held. A little later the military seized power in the country, and in 1974 the States which had been planned as territories for the minority nationalities were formally abolished. The current situation is well known: the tension in these areas has given rise to bloody fighting in the territories of the Karens, Karenni (Kayahs) and Shans.

289. The fact that efforts to resolve the problems faced by Burma at that time - and which Myanmar still faces today - i.e. the problems related to its multi-ethnic character are still continuing should not come as a surprise if one bears in mind two factors which, in the Special Rapporteur's view, are of key importance.

290. The first is related to the different position held in 1947, in relation to the creation of the new State, by the various nationalities which then inhabited (and still inhabit) its territory. These divergencies were very serious and were particularly apparent during the process of drawing up the Constitution of the new State, 117/ which was finally adopted in September 1947.

291. The second relates to the Panglong Agreement itself and in particular, to the nature of participation on the negotiations which led to it.

292. There is clear historical proof that these negotiations were based on an underlying tripartite structure, on the one hand, the Burmese as such, and on the other the representatives of the "hill tribes" referred to above; the representatives of His Majesty's Government were the third party in the negotiations. It has already been stated that some believed that the government representatives imposed conditions for independence; since that was the case, in the light of other experiences one should not be surprised.

293. The Panglong Agreement must therefore be understood in the light of the role played by the British colonizers in relation to these "tribes", as well as the struggle for independence and national unity at the end of the war. Silverstein reminds us 118/ that Prime Minister Attlee stated, before the British Parliament, that in the case of Burma "ultimate unification has always been our policy". In reality, if one takes into account the support and preferential treatment that the British authorities had granted to these nationalities during its long colonial rule in Burma, his statement reflected a change of position.

294. With regard to Africa, the Special Rapporteur has devoted his attention on this occasion to two situations which he had already selected in his first report (paras. 336 and 368); i.e., the Treaty (or Agreement) between Great Britain and the Chiefs of Sierra Leone of 22 August 1788 and the situation of the San nationality in southern Africa.

295. In analysing the nature and scope of the Treaty (Agreement) of 1788, it is appropriate to begin with a few general considerations regarding the history of the treaties concluded by local African governments with their European counterparts with regard to both the legal relations established

between both parties before the so-called "scramble for Africa" among the European colonial powers at the end of the nineteenth century, and also those concluded after the scramble came to an end.

296. As is known, the first active Europeans in Africa were the Portuguese, who began their commercial activities on the coasts of that continent in the middle of the sixteenth century. They were followed by Great Britain, France and Holland and later by Belgium.

297. According to Alexandrowicz, 119/ the main difference between the Portuguese and the other Europeans in those early contacts was that the former "came to Africa, and later to Asia, as servants of the Crown and not as employees of trading companies engaging primarily in trading operations such as the East India Company and the Africa Companies [which were also established]". 120/

298. Naturally, that difference had repercussions on those early stages of the treaty-making process in the African context, especially as the "Royal Companies" that came there did not always have "sovereign powers" - which the Portuguese always did have - to conclude acts of external sovereignty in the name of the State in which they were formally established as trading entities. Alexandrowicz explains this as follows:

> "It is the conferment of delegated sovereign rights which vested external legal capacity in a Company and allowed it to act in the international field, to conclude treaties, transact rights and obligations, acquire territory for its Sovereign, maintain a military force and administer territory. The exercise of rights of external sovereignty was under strict control of the national Government of the country which granted the charter. The degree of such control varied from country to country. English companies were less restricted by government control than French or German companies." 121/

299. The question of the legal capacity of the signatories of such instruments is therefore of crucial importance in determining their nature and validity. Alexandrowicz himself - after stressing the importance for such companies of ensuring that the indigenous governments did in fact possess the rights covered by transactions and had the capacity to transmit them - establishes an important distinction:

> "Rights transferred in this way could be public or private rights, but it was essential that the Ruler had sovereign powers, i.e. powers in public law, external and internal. In other words, it was essential that the European Sovereign-transferee should receive rights capable of being enjoyed in international law and valid vis-à-vis other powers." 122/

300. Although the foregoing refer to early treaties or agreements, those rules continued to be valid after the "carve-up of Africa" sanctioned in the Agreements of the Berlin Conference of 1885.

301. It should be pointed out, however, that the Conference added rules to a game that was becoming increasingly complicated. The frequent armed clashes in the African continent between the colonial forces of the various empires of

the era were threatening to disturb or even destroy the delicate balance of relations at the centre (Europe) among the key performers in the "Concert of Europe" of the time.

302. There were several important moments in the struggle for dominion over this part of the periphery: Great Britain's annexation of Lagos; the establishment of the United African Company in 1878; the proclamation by the French, in 1882, of their protectorate over Porto Novo; and finally the protectorate established by Germany over the Togo coast.

303. The new rules of the game issued by the first Berlin Conference were clear: occupation of the territory, over which rights were then demanded (in particular the coastal areas and with regard to rights concerning the exercise of sovereignty), followed by the addressing of appropriate diplomatic notifications to potential rivals; treaties with the local chiefs regarding the territories of the hinterland of the occupied coastal areas; freedom of navigation on the Congo and Niger rivers; and subsequent possibility of establishing and developing settlements in the interior.

304. In their colonial rivalry, all the Powers present in Africa sought to conclude agreements for the transfer of rights (of the most varied kinds) with the local governments. Many of those instruments were concluded under the cover of existing protectorates, and such rights were frequently granted in return for presents for the local governments and their followers in ceremonies formalizing the particular "legal business" involved.

305. It should be noted that in many cases local chiefs concluded such treaties with each of the competing European powers, with the successive agreements covering the same rights. This was the reason for the importance, in their day, of questions such as who was the first to obtain the agreement and the legal capacity of the African party in the transaction.

306. There is one key premise underlying the entire question of the possible existence of "treaties, covenants and other constructive agreements" between States and indigenous peoples in the African context which must be kept in mind at all times.

307. This is no other than the fact that many communities which could be considered as indigenous peoples in the context of this study, on the basis of their life-styles and habitat (but excluding other factors such as their "indigenousness" today as compared with the same "indigenousness" of other communities coexisting in the same territory of the current States of the region), did not in fact maintain these types of legal relations - in particular relations involving treaties or agreements - either with the colonial Powers (before or after the "carve-up"), or with the States that succeeded those Powers and emerged in contemporary Africa after the decolonization process.

308. To be sure, there is a long and often complicated history of treaty-making in the African context, but that history rarely has anything to do with the history of the indigenous populations of that region of the world.

309. Of no small importance in this anomalous situation is the fact that generally speaking, in practice - although not from a formal legal point of view - those communities, nationalities, ethnic groups, peoples and nations were considered by the colonial Powers from outside the region more as objects than subjects of international law. Developments in this field in Africa were quite different from those in English-speaking North America.

310. Specifically regarding the 1788 Treaty we are analysing, it can first of all be said that many instruments of a similar nature, both in form and contents, may be found in the legal history mentioned above. It is obviously representative of some aspects of the question of "indigenous treaties in the African context".

311. However, it should be emphasized that this is an eighteenth-century instrument, concluded at a time when there were few "Royal Companies" active in Africa; the first English company of this type was the Company of Merchants, which operated from the mid-seventeenth century until the 1820s. The vast majority of entities of this type began to operate in Africa in the second half of the nineteenth century. Before then, competition in Africa was not so intense; thus many treaties with non-discrimination clauses were concluded during the first half of that century.

312. On the assumption that the European version of this "Treaty" between the English and the Sierra Leone chiefs is authentic, the text lays down a cession of territory in return for presents for the African party. The signatories were King Nambaner, chief of Sierra Leone - in his own name and in the name of the other kings, princes, chiefs and potentates - and Captain John Taylor, of the ship Miro, in the name and for the sole benefit of the free community of colonists, their heirs and successors.

313. The foregoing gives the essence of the document, which is exactly like the so-called Batman Treaty in the Australian context and is nothing more or less than a sale of land to individuals on a private basis.

314. In the Special Rapporteur's view, it certainly does not constitute an instrument of international law relevant to his study. In his view it is neither a treaty nor a convention under international law (of the period or contemporary) because of the legal personality of those on whose behalf the signatory for the non-indigenous party negotiated it, who lack per se those powers in public law to which Alexandrowicz was referring (see above, para. 299).

315. Furthermore, the fact that this text is included in the well-known Consolidated Treaty Series published by Parry tells us only Parry's views on its nature, and those views only as valid as one perceives them to be. In addition, if Captain Taylor did have powers relating to English external sovereignty delegated by His Majesty, he did not expressly refer to them in his actions, and thus such powers would have no relevance in this purely private legal matter.

316. Finally, the Special Rapporteur highly doubts that the document might represent a "constructive arrangement" for the purposes of this study, bearing in mind the prevailing conditions in the African context of the time.

317. As regards the San nationality, also known as Basarwa in the context of southern Africa, where they live - or as Bushmen in Anglo-Saxon anthropological literature - their current situation and in particular potential status as an indigenous people for purposes of this study, the ideas expressed by the Special Rapporteur in chapter II of this report, concerning the minority/indigenous people dichotomy, should be borne in mind, as well as his remarks in this chapter (paras. 273 and 274 above) on the difficulties that the vast majority of the African and Asian countries have had to face in their search for national unity, after their establishment as independent States, due to their undeniably multi-ethnic nature.

318. The Special Rapporteur is convinced of the difficulty - bordering on the insuperable - of applying to the African context certain criteria that have recently come into use - even in the United Nations - relating to the "autochthonicity", "aboriginality" and "indigenousness" (or "indigenous people's status") of certain human groups originating on that continent.

319. His reservations in that respect are not without justification. They are based on what in his view are crucial elements, i.e. the complex history of migrations that went together with the economic, social and political development of the modern-day African States; the practical impossibility of qualifying as "non-indigenous" other human groups also residing with them in those same States and, last - but not least - the impact that European colonialism has left on the continent and on the current situation of innumerable African communities and ethnic groups, even decades after having been formally eliminated.

320. The arbitrary character of many of the current frontiers - whose colonial roots may be found in the decisions of the above-mentioned Berlin Conference - and the privileged treatment which the colonial authorities gave to some ethnic groups and nationalities over others (both in access to education, public service and even the armed forces) in the pre-independence period are some of the factors that are still causing problems in many African societies today.

321. This accounts for the reasoned arguments of some serious sources 123/ in favour of international recognition of the San as an indigenous people, basically in order to safeguard their physical existence and preservation of their traditional culture (in particular their language) and lifestyle, which according to the same sources are in danger of extinction.

322. Against the background described above, it should nevertheless be pointed out that the San have particular features. They live principally in Botswana and Namibia today, although there are some traces of them in southern Angola. They are traditionally hunter-gatherers and have been threatened throughout history, first, by the migrations of the Bantu-speaking peoples, and later by the white colonization. There are practically no San still living in South Africa.

323. During the nineteenth century what remained of them scattered towards the north, and today pockets of San are concentrated in what is the traditional

centre of the huge territory they used to occupy, the Kalahari desert, which extends from Namibia to Botswana and especially the Kalahari hunting reserve, which is completely surrounded by Botswanan territory.

324. The case of the San, and those of other hunter-gatherer nationalities, has generated considerable discussion in anthropological literature in recent decades. All these human groups are distinct from other ethnic groups or nationalities in the States in which they now live, basically through their living habits, which contrast with those followed by the other groups (which generally control the economy, dominate the State administration and determine the economic model to be followed by the entire country).

325. This new anthropological approach to the problem of these human groups tends to use a model of analysis that abandons the isolationist and evolutionist criteria formerly used to study them in favour of a historical and interactive framework, aimed at deciphering and understanding how the San and other Bushmen relate to the rest of the society in which they live. 124/

326. Studies conducted under this type of approach have come across a great variety and complexity in the current living habits of the San, who are obviously subject to many acculturating factors in their daily existence. In Botswana, for example, it has been shown that very few San continue to base their existence entirely on a hunting and gathering economy; many of them have become sedentary and are interacting regularly with other ethnic sectors of society. 125/

327. Stephen, in addition to expressing his concerns at the - according to him - near-certain disappearance in a relatively short period, of the San language and lifestyle, nevertheless acknowledges the importance of the "political values" of the country in which they live for the solution of these problems. 126/ Even Moeletsi acknowledged in 1993 that it was encouraging "to see the Government of Botswana (and others) beginning to discuss the problems of the San with the San themselves". 127/

328. Everything indicates that the main practical problem now facing the San - basically in Botswana - is that their traditional economy (based on hunting) is not very compatible with the central activity (stock-raising) of the country's principal nationality, the Tswana; this is of crucial importance, since beef is precisely that nation's main export product. Government pressures to increase beef production have brought pressure to bear on the San, whose traditional areas include good pastures and water sources.

329. It is a well-known fact that one of the Special Rapporteur's faults is that he never seeks to avoid debate. However, it appears to him that in the case of the various African nationalities, ethnic groups, peoples and minorities, conceptual debates over whether they are "minorities" or "indigenous peoples" are less important than finding the practical solution to their daily problems. And the case of the San appears to prove his point.

330. Undeniably, from 1993 new political situations have developed in practically all the countries of southern Africa where San people are living. There is no question that the accession to power by the indigenous sector of

the population of that region has had a beneficial influence on the situation in the region. And it is to be hoped that possible claims of the San will have a better chance than ever to be taken into account by the Governments of the four countries concerned.

331. Although reluctant to conclude this part of his report on a negative note, the Special Rapporteur feels obliged publicly to express regret at not yet having received replies to the questionnaire from the Governments of Angola, Botswana, Namibia and South Africa. There is no doubt that those replies would have given him many more possibilities of delving deeper into the problem of the San in that part of Africa and - more importantly - of exploring practical solutions to the problem for inclusion in the recommendations of his final report.

IV. CONCLUSIONS AND RECOMMENDATIONS

332. Following the same methodology he used in his first report, in the three previous chapters of this second report the Special Rapporteur has put forward a series of conclusions not only on the substance of the matters they deal with, but also on the future direction of his work, in order that this study may be concluded as quickly as possible.

333. As he did in 1992, instead of reproducing those conclusions in the final version of this report, he has considered it more useful to refer the reader directly to those paragraphs of the report that he feels contain especially relevant information for understanding the views expressed in this document.

334. In this connection, he draws attention to the final sentences of paragraph 10 of the introduction and paragraphs 19, 21, 22, 24, 29, 32, 38 and 39 of chapter I.

335. In chapter II, he would like to emphasize the contents of paragraphs 57, 58, 61, 63, 65, 71-73, 78, 88, 96-97, 100-102, 107, 114, 118, 122, 126 and 128.

336. In chapter III, he stresses the information and ideas contained in paragraphs 135-136, 149, 152, 164, 167, 174, 183-184, 189-190, 197, 204, 208-209, 212, 225, 234-235, 238, 255-256, 270, 273-274, 294, 299-301, 306-307, 309, 314, 316, 318-319 and 330.

337. Despite the advanced stage reached in the research work, much remains to be done in this respect. The Special Rapporteur hopes shortly to receive documentation generated by two of his most recent research projects conducted in the field, and also that his meetings with official sources last February in Geneva will bear fruit, in particular as regards the provision by the Governments concerned of the constitutional and legislative provisions governing indigenous issues in their countries.

338. The foregoing makes it even more necessary to continue - on an ongoing basis and not haphazardly or sporadically - receiving specialized advisory assistance from the Centre for Human Rights, either through its own staff or by hiring a consultant.

339. The Special Rapporteur considers it indispensable to establish direct contacts, during his next stay in Geneva, with the representatives of a number of States and indigenous organizations whose replies to the questionnaire sent to them in 1991-1992 have not yet been received, and which are of particular importance for the final phase of his work.

340. There has been a clear improvement recently in coordination and communication with the Centre for Human Rights. The new technology available to the unit has played a role in that improvement; but more important has been the human aspect. However, the problem of the Special Rapporteur's constant uncertainty over whether or not he would be able to hire the services of a consultant (and not simply use volunteers) has continued to have a negative influence on his work.

341. It should be borne in mind that for various reasons it has not been possible to include in this second report the results of the research on the historical development of specific situations in various regions. The bulk of this work is completed, and the Special Rapporteur hopes to have the opportunity of submitting it for the consideration of both the Working Group and the Sub-Commission as a preparatory document for the submission of his final report on the study.

342. In the light of the foregoing, the Special Rapporteur would like to make the following recommendations:

(a) It is essential for the ongoing advisory assistance requested by the Special Rapporteur to be guaranteed, in one of the forms mentioned in paragraph 338 above; and

(b) For the reasons expressed earlier, the Special Rapporteur would like to be authorized - as has occurred in other cases involving complex special studies like this one - to submit a third progress report in 1996 and his final report in 1997.

Notes

1/ See document E/CN.4/Sub.2/1994/30, para. 93.

2/ Ibid., paras. 94-96.

3/ Ibid., paras. 156 and 157.

4/ Document E/CN.4/Sub.2/1992/32, paras. 216-221, gives the background to this question.

5/ Charles H. Alexandrowicz, An Introduction to the History of the "Law of Nations" in the East Indies, 16th, 17th and 18th century (Oxford, Clarendon, 1967) p. 169.

6/ Ibid., p. 106

7/ For example, the treaty concluded by the Dutch East India Company with the Sultan of Kedah (Malay Peninsula) in 1648. Cf. Om Prakash, "The Dutch East India Company in the Trade of the Indian Ocean" in India and the Indian Ocean 1500-1800 (Ashin Das Gupta and M.N. Pearson, eds.) (Calcutta, Oxford University Press, 1987), p. 194.

8/ For example the treaties that granted Holland particular exclusive trading rights and were imposed on the sovereigns of Palembang (1678) and Cheribon (1681). Cf. Ibid.

9/ M.C. Ricklefs, A History of Modern Indonesia (London, Basingstoke, MacMillan, 1981), p. 22.

10/ Charles H. Alexandrowicz, op. cit., "The Afro-Asian World and the Law of Nations (historical aspects)", in Recueil des cours de l'Académie de droit international, 123:117-214.

11/ Jörg Fisch, Die europäische Expansion und das Völkerrecht (Stuttgart, Steiner, 1984).

12/ Dieter Dörr, et al., "Die 'Wilden' und das Völkerrecht" in Verfassung und Recht in Übersee (Hamburg), 24:372-393.

13/ M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (London, Longmans/Green, 1926).

14/ See document E/CN.4/Sub.2/1992/32, paras. 18-21, in particular para. 21.

15/ See document E/CN.4/Sub.2/1994/30, para. 96, and the final part of Sub-Commission decision 1994/116.

16/ E/CN.4/Sub.2/1991/33, para. 98.

17/ Ibid., para. 99.

18/ E/CN.4/Sub.2/1988/24/Add.1, para. 112.

19/ Resolution 1988/56 of 9 March 1988, para. 3.

20/ Decision 1988/134 of 27 May 1988.

21/ E/CN.4/Sub.2/1991/33, paras. 92 and 93.

22/ E/CN.4/Sub.2/1992/32, para. 170.

23/ Ibid., chapter IV. The total of 41 situations may be broken down as follows: 10 relating to treaties; 6 to agreements; 3 to "other constructive arrangements"; 12 involving indigenous peoples who at the time were parties to or the subject of any of the above three categories; and 10 in which indigenous peoples could be regarded as third parties to treaties (bilateral or multilateral) between non-indigenous nations. The Special Rapporteur explained his reasons for that initial selection in paragraph 171 of his first progress report.

24/ Ibid., para. 169.

25/ Ibid., para. 172. Despite the progress made in gathering primary documentation, as mentioned in chapter I of this report (para. 28 above), the imbalance in this respect persists as far as different regions are concerned, a point made in paras. 29-32 above.

26/ Francesco Capotorti, "Minorities", in Encyclopedia of Public International Law (R. Bernhardt et al., eds.), (Amsterdam, Elsevier, 1985), vol. 8, p. 385.

27/ Jules Deschênes, Proposal concerning a definition of the term "minority" (E/CN.4/Sub.2/1985/31), para. 181.

28/ United Nations General Assembly resolution 47/135, adopted on 18 December 1992.

29/ Isabelle Schulte-Tenckhoff and Tatjana Ansbach, "Les minorités en droit international", in Le droit et les minorités (A. Fenet, Dir.), (Brussels, Bruylant, 1995), pp. 15-16.

30/ Where the only reference to rights belonging to a collective entity (protection by "society and the State") relates to the family, in article 16, paragraph 3. All other rights mentioned are ascribed to persons as individuals.

31/ Schulte-Tenckhoff and Ansbach, op. cit., p. 16.

32/ They mention (op. cit., note 2) that the United Nations General Assembly has adopted international instruments on migrant workers, namely the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (resolution 40/144 of 13 December 1985) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (resolution 45/158 of 18 December 1990).

33/ Ibid., pp. 17 and 19. In support of their conclusion they quote (note 6) the study on the achievements made and obstacles encountered during the Decades to Combat Racism and Racial Discrimination prepared by Mr. Asbjorn Eide, Special Rapporteur (E/CN.4/Sub.2/1989/8/Add.1), p. 6.

34/ Document E/CN/4/Sub.2/1986/7/Add.4 (vol. V of the final report). Later issued as a United Nations publication, Sales No. S.86.XIV.3.

35/ The capital contribution to this monumental study made by Mr. Augusto Willensen-Diaz, then in charge of indigenous questions at the United Nations Centre for Human Rights in Geneva, will never be adequately recognized.

36/ According to Schulte-Tenckhoff and Ansbach, (op. cit., p. 20 and note 8), the same "ambiguity" can be seen in international documents (such as ILO Convention No. 169) and in some secondary sources. The Convention, for example, distinguishes between "tribal peoples" and "indigenous peoples" in independent countries.

37/ In paragraph 373 of the "Conclusions, proposals and recommendations" contained in his final report (see note 34 above), Martínez Cobo pointed out that, with regard to the circumstance that gave rise to the notion of indigenous populations, particular importance should be attached to "their historical rights to their lands", among other factors.

38/ Isabelle Schulte-Tenchoff, "L'Etude des Nations Unies sur les traités entre peuples autochtones et Etats" in *Recherches amérindiennes au Québec*, XXIV (4) (1994); 17-27, p.26.

39/ Walter L. Williams, "United States Indian policy and the debate over Philippine annexation: implications for the origin of American imperialism" in *Journal of American History*, 66 (4) (1980), pp. 810-838.

40/ Ibid., pp. 811 and 812.

41/ Rodolfo Stavenhagen, "The indigenous problematique" in *IFDA Dossier* (Nyon), 50 (1985), 3-14; p. 10.

42/ It is relevant to draw attention in this context, *inter alia*, to the cases of the Spanish autonomous regions and the former federated republics in the former Yugoslavia.

43/ A problem which is not, of course, in the slightest degree peculiar to the African continent.

44/ One should bear in mind the differences in the treatment by the League of Nations of the action by the Haudenasaunee leader, Deskaheh, in 1923 and the grievances of the European minorities following the First World War.

45/ Schulte-Tenckhoff, op. cit. (in note 38 above), p. 25.

46/ For example, the *Sandra Lovelace v. Canada*; *Micmaq Tribal Society v. Canada*, *Lubicon Lake Band v. Canada*; and *Kitok v. Sweden* cases.

47/ In recent years, such doubtful entities as the so-called *Rehoboth Basters* (living in Namibia) have freely taken part in discussions during the Working Group's meetings; and, in 1994, the Working Group accredited a delegation of Afrikaners representing a party that had just refused to take part in the first democratic elections in South Africa (its presence gave rise to understandable and widespread distaste among the participants) (referred to by Schulte-Tenckhoff, op. cit. (note 38 above), p. 24).

48/ The Rights of Indigenous Peoples (Fact Sheet No. 9), Centre for Human Rights, Geneva, 1990.

49/ See documents A/48/601, para. 62, and E/CN.4/Sub.2/1994/48, para. p. 126.

50/ In this context it should be borne in mind that, in the Special Rapporteur's view, the future existence of the Working Group on Indigenous Populations was momentarily in jeopardy immediately following the conclusion of the World Conference on Human Rights (Vienna, June 1993).

51/ See document E/CN.4/Sub.2/1992/32, para. 169.

52/ See note 34 above, para. 388.

53/ Schulte-Tenckhoff, op. cit (note 38 above), p. 26.

54/ This was, of course, written before Nelson Mandela took power as the first truly representative President of South Africa.

55/ Document E/CN.4/Sub.2/1992/32, para. 208.

56/ Ibid., para. 213.

57/ Ibid., paras. 138 and 140 and notes 52 and 53.

58/ Ibid., para. 159 and note 80.

59/ Ibid., para. 160.

60/ Ibid., para. 167.

61/ Ibid., chap. IV, paras. 223, 229, 239, 251, 278, 281, 290, 292, 310, 319, 336, 342, 362, 363, 365, 367, 371, 374, 378, 379, 381, 386 and 388.

62/ Ibid., para. 169.

63/ Alexandrowicz, op. cit. (notes 5 and 10 above).

64/ Fisch, op. cit. (note 11 above).

65/ Dörr, op. cit. (note 12 above).

66/ Lindley, op. cit. (note 13 above).

67/ Ibid., p. 20.

68/ Alexandrowicz, op. cit. (note 5 above), p. 235.

69/ Ibid., p. 149.

70/ Ibid., p. 154.

71/ Case concerning right of passage over Indian territory.

72/ Shabtai Rosenne, "The meaning of 'authentic text' in modern treaty law" in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (R. Bernhardt et al.) (Berlin, Springer-Verlag, pp. 759-784), pp. 782 and 784.

73/ Alexandrowicz, op. cit. (note 5 above), p. 225.

74/ Fisch, op. cit. (note 11 above).

75/ 31 U.S. 6 Pet. (1832), pp. 542-543.

76/ Fisch, op. cit. (note 11 above), p. 44.

77/ Ibid., pp. 498-499.

78/ See the reference in note 57 above.

79/ Fisch, op. cit. (note 11 above), p. 503.

80/ Ibid., p. 505.

81/ Document E/CN.4/Sub.2/1992/32, paras. 272-280.

82/ Recent literature on the situation in Aotearoa/New Zealand has included the works of Claudia Orange, *The Treaty of Waitangi* (Wellington, Allen & Unwin, 1987); I.H. Kawharu, *Maori Land Tenure: Study of a Changing Institution* (Oxford, Clarendon Press, 1987); I.H. Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland, Oxford University Press, 1989); R.J. Mulgan, *Maori, Pakeha and Democracy* (Auckland, 1989) and A. Sharp, *Justice and the Maori* (Auckland, 1991). The special issue on the Treaty of Waitangi published by the *New Zealand Universities Law Review* 14 (1), (1990) is also important.

83/ Ian Brownlie, *Treaties and Indigenous Peoples* (Oxford, Clarendon Press, 1992).

84/ Although in the sentence handed down in the case of Wi Parata v. Bishop of Wellington in 1877 (3 New Zealand Jurist SC 72 at 78); Justice Prendergast expressed the view that the Treaty of Waitangi was a "simple nullity".

85/ The quotations of Brownlie mentioned above can be found in the author's work (see note 83 above), pp. 6, 9, 24, 26, 49, 51, 62, 63, 73, 78 and 94.

86/ These include the New Zealand Constitution Act (U.K., 1852); the Statute of Westminster (1931), adopted in New Zealand in 1947; the New Zealand Constitution Amendment Act (1947); the Treaty of Waitangi Act (1975), the Treaty of Waitangi Amendment Act (1988); the Bill of Rights (1985 and 1990); the Constitution Act (1986) (New Zealand) and the Treaty of Waitangi (State Enterprises Act (1986).

87/ Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law (Oxford, Clarendon, 1975), pp. 332 and 333.

88/ This is the version in Section 4 of the First Schedule to the Treaty of Waitangi Act of 1975, superseded by the Treaty of Waitangi Amendment Act of 1985.

89/ I.H. Kawharu, op. cit. (see note 82 above).

90/ Fourth World Bulletin, Autumn-Winter 1995, vol. 4, No. 1/2, p. 31.

91/ Ibid.

92/ Henry Reynolds, The Law of the Land (Victoria, Penguin Books, 1992) (second edition).

93/ Ibid., pp. 32-33 and 207.

94/ Ibid., p. 95.

95/ Ibid., p. 152.

96/ The result of this new approach seems to have been both the approval of the Council for Aboriginal Reconciliation Act of 1991, and the reconstitution of the Aboriginal and Torres Strait Islander Commission (ATSIC) in March 1990. The ATSIC is controlled by the indigenous population and has replaced both the Department of Aboriginal Affairs and the Aboriginal Development Commission set up in the 1970s (see the Aboriginal and Torres Strait Islander Commission Act (1989)). ATSIC is considered the most important advisory body to the Government on indigenous issues.

97/ 175 Commonwealth Law Report 1, 1992.

98/ The Australian Contribution (1992), p. 71, compiled by ATSIC for the tenth session of the Working Party (1992).

99/ Garth Nettheim, "The consent of the Natives. Mabo and Indigenous political rights", in Sydney Law Review 15 (2) (1993), pp. 223-238.

100/ Liliuokalani, Hawaii's Story by Hawaii's Queen (Ch.E. Little, Nutley/Tokyo, 1964 [1898]).

101/ Ibid., pp. 354-355.

102/ Ibid., pp. 372.

103/ Ulla Hasager, "International Tribunal of Peoples, Hawaii, 1993", in Indigenous Issues (Copenhagen, IWGIA), No. 1, January/February/March 1994, pp. 4-10.

104/ Document E/CN.4/Sub.2/1992/32; para. 362.

105/ Cf. Emiko Ohnuki-Tierni, The Ainu of the Northern Coast of Southern Sakhalin (Prospect Heights, IL, Waveland Press, 1994).

106/ Teshima Takemasa, "From the assimilation policy to the guarantee of the rights of the Ainu as an indigenous people: a critique based on the reality of discrimination against the Ainu" in Human Rights in Japan from the Perspective of the International Covenant on Civil and Political Rights (no place of publication given, Busaku Kaiho Kenyusho, 1993, pp. 29-36).

107/ See Third Periodic Report of the Government of Japan to the Human Rights Committee (1991) (CCPR/C/70/Add.1 and Corr.1).

108/ Takemasa, op. cit., p. 31.

109/ Ibid., p. 32.

110/ Ibid., p. 33.

111/ Joseph Silverstein, Burmese Politics. The Dilemma of National Unity (New Brunswick, N.J., Rutgers University Press, 1980).

112/ Three important population groups may be distinguished: the Tibeto Burman (which includes the Burmese properly speaking, the Arakanes, the Chins and Kachins), the Mon-Khymer and the Sino-Tai (made up of the Shans and the Karens). In addition to the groups referred to, there are certain groups of immigrants, especially those from India, who were encouraged by the British colonizers to establish themselves in this area.

113/ Roland Bless, "*Divide et impera*". *Britische Minderheitenpolitik in Burma*, "*(Divide and Conquer*". *British Policy on Minorities in Burma*) 1917-1946 (Stuttgart, F. Steiner, 1990), p. 45.

114/ Silverstein, *op. cit*., pp. 109-119.

115/ Robert H. Taylor, *The State in Burma*, (London, C. Hurst, 1987), p. 266.

116/ Edmond Leach, *Political Systems in Highland Burma. A Study of Kachin Social Structure* (London, London School of Economics, 1964).

117/ Silverstein, *op. cit*., pp. 129-131.

118/ Ibid, p. 102.

119/ Charles H. Alexandrowicz, *The European-African Confrontation. A Study in Treaty-Making* (Leyden-Njihoff, 1973).

120/ Ibid., pp. 14-15.

121/ Ibid., p. 41.

122/ Ibid., p. 30.

123/ See, for example, Batlhalefhi Moeletsi, "Los San de Botswana: situacion legal, acceso a la tierra, desarrollo y recursos naturales" in *Boletín* (Copenhagen, IWGIA, No. 4/93, pp. 45-49, and David Stephen, *The San of the Kalahari* (London, Minority Rights Group), Report No. 56, 1982.

124/ Alan Bernard, *Hunters and Herders. A comparative Ethnography of the Khoisan Peoples* (Cambridge, University Press, 1992).

125/ Pnina Motzafi-Haller, "When Bushmen are known as Basarwa: gender, ethnicity and differentiation in rural Botswana", in *American Ethnologist*, 21 (3) (1994), pp. 539-562.

126/ Stephen, *op. cit*., p. 4.

127/ Moeletsi, *op. cit*., p. 46.

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